S. HRG. 99-643

THE UNFAIR FOREIGN COMPETITION ACT OF 1985

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1655

A BILL TO AMEND THE UNFAIR COMPETITION ACT OF 1916 AND CLAYTON ACT TO PROVIDE FOR PRIVATE ENFORCEMENT OF THE UNFAIR COMPETITION STATUTE IN THE EVENT OF UNFAIR FOREIGN COMPETITION, AND TO AMEND TITLE 28 OF THE UNITED STATES CODE TO PROVIDE FOR PRIVATE ENFORCEMENT OF THE CUSTOMS FRAUD STATUTE

NOVEMBER 20, 1985

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THE UNFAIR FOREIGN COMPETITION ACT OF 1985—S. 1655

WEDNESDAY, NOVEMBER 20, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 11:21 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Hatch, Specter, McConnell, Metzenbaum, and Grassley.

Staff present: Ken Starling, chief antitrust counsel; Randall Rader, counsel; Neal Manne, counsel; Alice Milder, counsel; Victor Maddox, counsel, and Stephen Ross, minority counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. Today, the committee meets to open hearings on S. 1655, a bill introduced by our distinguished colleague, Senator Specter.

This legislation addresses some of the problems facing American business; namely, unlawful dumping of foreign goods in American markets and customs fraud by importers.

While this country has long sought to develop and foster international trade, we must ensure that the competition which results is fair to all.

The bill before us would amend the antitrust laws to include "dumping," within the definition of activity prohibited by those laws. The bill would also amend the Antidumping Act to create a private cause of action for persons injured by unlawful dumping of foreign goods. In addition, the bill creates a private cause of action for persons injured by customs fraud.

The impact of these practices on American businesses is an issue of vital concern in today's competitive world. We have a number of very well-informed witnesses appearing before us today. I also understand that the position of the administration will be provided in writing and included in the record of this hearing.

The committee appreciates the contribution of all of these views to our deliberations on these issues.

Senator Specter was chief sponsor of this bill. Would you mind giving us your cosponsors on this bill, Senator?

Senator SPECTER. Senators Dole, Cohen, Dixon, Heflin, Heinz, Kennedy, Murkowski, Byrd, and D'Amato.

The CHAIRMAN. I believe I will join as a cosponsor, so if you will just list those for the record.

Thank you.

We have a cosponsor of the bill here now, the able and distinguished senior Senator from Pennsylvania, the Hon. John Heinz.

We would be very pleased to hear from you at this time.

Senator MCCONNELL. Mr. Chairman, if I may, before you take Senator Heinz, I would just like to commend Senator Specter for this important legislative innovation and include an opening statement in the record.

The CHAIRMAN. Without objection, your statement will be included in the record.

[Statement follows:]

OPENING STATEMENT OF SENATOR MITCH MCCONNELL

I am pleased to have the opportunity to participate in this hearing today on the problem of unfair foreign competition. The problem posed by the dramatic trade imbalance it has helped to cause—and the threat to the livelihoods and ways of life of millions of Americans—cannot be taken too lightly.

Consequently, I believe Senator Specter is to be commended for taking an innovative approach to the problem. Dumping of foreign-manufactured goods is and has long been proscribed by American law. It is contrary to the basic understanding in the international community about the premissible methods of engaging in international commerce. And it is proscribed by the fundamental agreements we have reached in our international setting to regulate that commerce.

Nevertheless the Government has a difficult time enforcing those laws and agreements. As a result, it may well be that a private right of action for dumping violations is appropriate. After all, Congress has created such rights in dozens of situations out of recognition that private attorneys general can be a significant aid in the enforcement of the law. Similarly, the courts have declared the existence of implied rights of action in other cases.

So the idea is not unreasonable, and may well be a good one. Naturally, there are some countervailing considerations to consider. The amount of litigation that we could expect would be substantial. Moreover, the peculiar nature of the questions that arise in dumping cases, involving the extent to which foreign governments themselves are involved in the marketing of a particular good, may make such cases unsuited to private actions.

These are questions that I expect will be answered here today, so I look forward to reviewing the testimony of the witnesses.

The CHAIRMAN. Senator Hatch, did you have a statement?

Senator HATCH. Let me just make a few short comments.

I want to extend my praise to Senator Specter as well, and Senator Heinz, who have been at the forefront of leading some of the battles with regard to these problems. And I want to commend you, Mr. Chairman, for your leadership in bringing many of these important issues on unfair trade to the immediate attention of the U.S. Senate and, of course, all of America.

This particular bill, S. 1655, the Unfair Foreign Competition Act of 1985, contributes further to this dialog. This legislation would provide direct access to Federal courts for parties aggrieved by dumping.

This deserves special and careful consideration for several reasons. In my mind, the primary concern is that a sudden influx of dumped imports can do substantial harm to industries vital to the economy and security of our Nation. I have witnessed this first hand with steel producers and copper producers in my own State of Utah. These industries are essential for our national security and the well-being of our country.

Accordingly, I am going to study this bill very carefully as well as other measures to ensure adequate protection against generally unfair subsidization of imports, customs fraud, or dumping.

I again want to commend these two Senators from Pennsylvania, who are so affected by these matters, and you, Mr. Chairman, who I think has led most of the fight on the floor, particularly for the textile industry, for the work you have done in this area.

I do not want to take any other time and will put any other remarks I have in the record.

The CHAIRMAN. Thank you, Senator.

[Statement follows:]

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman. At the outset of the hearing, I would like to commend the Chairman for his leadership in bringing many of these important issues of unfair trade to the immediate attention of the United States Senate and the nation. S. 1655, the Unfair Foreign Competition Act of 1985, contributes further to this dialogue. This legislation would provide direct access to fedeal courts for parties aggrieved by dumping.

This deserves careful consideration for several reasons. In my mind, the primary concern is that a sudden influx of dumped imports can do substantial harm to industries vital to the economy and security of the nation. I have witnessed this firsthand with steel producers and copper mining in the State of Utah. These industries are essential to our national security and well-being. Accordingly, I will study carefully S. 1655 and other measures to ensure adequate protection against genuinely unfair subsidization of imports, Customs fraud, or dumping.

The CHAIRMAN. Senator Hatch has asked that following Senator Heinz, we start with the second panel; he has got to leave soon. Is that agreeable to you, Senator Specter?

Senator SPECTER. Of course. And if I might just say a word by way of introduction, Mr. Chairman, Senate bill 1655 is a continuation of legislative efforts which I have made in the 97th, 98th, and now the 99th Congress, to try to structure an enforcement remedy to stop unfair foreign trade practices.

The essence of the bill is that it allows the Federal courts through congressional authorization to grant injunctions to stop any violation of existing laws. It does not introduce any new restrictive measures on imports, but seeks only to provide a remedy for existing restrictions.

It is now against the law of the United States to dump or subsidize, to bring in goods which are dumped or goods which are subsidized. But the record is clear that the proceedings before the International Trade Commission are insufficient.

This bill would authorize a private remedy. A company, a union, any aggrieved party could come to court to get a remedy. Similarly, this bill would authorize private action to enforce customs violations or violations, for example, of the Multi-Fiber Agreement, something very important to textiles and apparel. At the present time, those laws are circumvented when, for example, goods from Taiwan will be routed through New Zealand, or there will be a slight change in a fiber content, or there is mislabeling.

The reality is that the existing Federal agencies do not have the resources to adequately police these infractions of existing law.

There is nothing like self-help, there is nothing like private initiative, there is nothing like private enterprise, and it has been well-recognized in the laws of this country, illustrated by private actions

under the antitrust laws, that there is no more effective way to deal with violations of the law than to allow private complainants to go to court and get the remedies.

I have had an opportunity to discuss this personally with President Reagan, who is favorably disposed toward the bill. He did not give a final judgment on it, but instead, referred it to Treasury Secretary Baker.

Senator Heinz and I have made the rounds of every Cabinet officer concerning steel issues on a number of occasions—Secretary of State Shultz, Secretary of Treasury Don Regan, and now Treasury Secretary Jim Baker, Commerce Secretary Malcolm Baldrige, Trade Representative Bill Brock, and right down the line. I am also very grateful to you, Mr. Chairman, for holding these hearings and for lending your support to this legislation. Senator Dole and Senator Byrd are in favor of it, and I think it is a minimal effort to provide law and order and justice in the trade field.

Mr. Chairman, I thank you.

The CHAIRMAN. Senator Heinz, we are delighted to have you with us. You may proceed.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, let me say I am very pleased to have the opportunity to appear here before your Judiciary Committee. I am especially grateful to have the opportunity to comment on my colleague's legislation, S. 1655. I am here to express my support for it. As has been noted, I am a cosponsor.

Of course, his legislation provides a private right of action against unfair trading practices.

I want to be brief in my statement, because you have quite a full panel of witnesses, so I would ask unanimous consent that my entire statement might be included in the record.

The CHAIRMAN. Without objection, that will be done.

Senator HEINZ. Mr. Chairman, first let me commend my colleague from Pennsylvania for his diligence in pursuing this issue. This is the third version of his legislation. He has at every opportunity sought to refine it and improve it, and I am confident that it will ultimately be enacted.

In commenting on the bill, I really want to make just four points.

The first point is in a sense the most important. This bill would be a useful and indeed, I believe, necessary addition to our arsenal of weapons in combating dumping, subsidies and customs fraud, and perhaps other unfair trading practices.

I will simply say that despite the fact that we have a lot of laws on the books addressing those subjects right now, it is apparent that current law is not doing the job. It is slow, it is uncertain, and it is capable of manipulation by the foreign producer or importer. Most significant is the lack of timely relief. A dumping case involving any controversy will usually take 11 months, although both shorter and longer deadlines are possible, and although there are provisions for preliminary determinations and temporary remedies, they have not proven effective in halting the flood of dumped imports.

If anything, a pending dumping case encourages a foreign producer to ship in as much as he can prior to the conclusion of the case. And S. 1655, through its use of the judicial system, offers the possibility for more rapid relief in these cases.

Now, I must be candid with the committee. Some have criticized Senator Specter's bill in this regard by suggesting that in fact the courts will not act any quicker than the administrative process that handles the existing law. I am not an expert. That is a judgment the committee can make. It may or may not be true. But I will tell you this. We certainly all do know of cases that take years to work their way through the judicial system, but at the same time we are equally aware of rapid and responsive judicial action, and it is my view that we ought to leave the door open to that kind of rapid, injunctive-type relief that we have often seen.

The second point I want to make is that the idea of permitting a domestic industry to seek damages from the harm suffered by dumped and subsidized imports is a good one.

We should not delude ourselves, as some economists do, that dumping is simply the operation of comparative advantage in a market system. In fact, dumping and subsidization have nothing to do with comparative advantage. They are an attempt to deny it, not take advantage of it. And the cost to our economy, including the cost to consumers, comes over the longer term in the elimination or disabling of U.S. industries, whether it be steel or textiles or copper, and the market dislocations and ultimately higher consumer prices which result from the absence of effective domestic competition.

As you know, Mr. Chairman, we had hearings on the textile bill in the Senate Finance Committee—your bill. And one of the most interesting and, I thought, convincing pieces of testimony was the information on what happened when the last American producer of a fabric called "velveteen" went out of business. What happened was that foreign prices went up, the prices of imports went up 33 percent within a matter of months of the bankruptcy of the last American producer. That is an example of the costs of dumping and subsidies that our economists and laws do not measure, and it is where Senator Specter's legislation can be enormously helpful.

The third point is that the very nature of the process created by this legislation, as well as an opportunity to seek the damages that I just mentioned, I think, can provide a more effective deterrent than current law. If the importer knows he has a significant potential liability for his unfair actions, he may be more cautious.

Fourth and last, I, for one, reject the argument that the Federal judiciary is somehow less capable than the Department of Commerce or, for that matter, the International Trade Commission, in making these determinations. I grant you that these can be complex cases requiring economic analysis, but they are clearly not beyond the ability of our judges.

So in closing, Mr. Chairman, I would emphasize that this is an important bill. It addresses a serious and growing problem in a creative and effective way that supplements rather than supplants current law. Most of the criticisms concerning this approach have suggested it will not work, that it will not provide faster, more effective relief. I disagree with those contentions, but even if any of

them should turn out to be partially correct, it is not an effective argument against the enactment of this legislation. We are simply creating a parallel track in our law. No rights or opportunities under existing law are being removed. Complainants are being given an additional choice of tactics, and I certainly believe both current law and the judicial system can survive that opportunity, of a little more freedom of choice.

Accordingly, I urge the committee to act favorably on this legislation.

[Statement follows:]

STATEMENT BY SENATOR JOHN HEINZ

S. 1655

Mr. Chairman, I am pleased to have the opportunity to appear here today to express my support for S. 1655, the most recent version of Senator Specter's legislation to provide a private right of action against unfair trading practices. Let me begin by apologizing to the Committee for the brevity of my statement. I am in the midst of another hearing on trade policy, before the Finance Committee, and I have to return there shortly.

As I indicated, I support this bill. I believe it is an important and necessary addition to the body of existing laws dealing with unfair trading practices. I commend Senator Specter for his diligence in pursuing this issue, and I am confident that ultimately this legislation will be enacted. In commenting on the bill, I want to make 4 basic points.

First, it would be a useful addition to our arsenal of weapons combatting dumping, subsidies, and customs fraud. The United States market is the most open of the major industrial economies, and as such we have become the target for those producers and foreign governments determined to export, yet unable to obtain sufficient access to other markets. This process has accelerated in recent years as world economic growth has slowed, and producers scramble to find additional foreign markets to continue their growth. In some cases -- steel being a prime example -- foreign governments subsidize production, and government-owned facilities dump, as instruments of social policy to maintain employment and avoid political crisis. Thus, other nations' unemployment is exported to our shores. The short term benefit of lower prices is heavily outweighed by the long term economic and social costs to our country and the world trading system, which are caused by the economic distortions these policies foster.

There is widespread agreement -- in the United States, in the GATT, and in the developed world generally -- that these market distorting practices ought to stop. In the Congress, even those who have opposed broad-based import relief for major industries like steel or autos have acknowledged the need to fight dumping and subsidization, and have supported legal efforts to do so.

Despite that consensus, however, it is apparent that current law is not doing the job. It is slow, uncertain, and capable of manipulation by the foreign producer or importer. Most significant is the lack of timely relief. A dumping case involving any controversy will usually take eleven months, although both shorter and longer deadlines are possible. Although there are provisions for preliminary determinations and temporary remedies, they have not proven effective in halting the flood of dumped imports. If anything, a pending dumping case encourages a foreign producer to ship in as much as he can prior to the conclusion of the case. S. 1655, through its use of the judicial system, offers the possibility of more rapid relief in these cases.

Some have criticized this bill by suggesting that the courts will not, in fact, act any quicker than the administrative process that handles the existing law. That may well turn out to be true. We all know of cases that have taken years to work their way through our judicial system. At the same time, however, we also are aware of rapid and responsive judicial action, and my view is that we ought to leave the door open to that in trade cases. Its impact may be variable. It may not work at all in some cases but even so, the plaintiff would hardly be worse off with this additional option, than he is without it under current law.

Second, the idea of permitting a domestic industry to seek damages for the harm suffered by dumped or subsidized imports is a good one. We should not delude ourselves, as some economists do, that dumping is simply the operation of comparative advantage in a market system. In fact, dumping and subsidization have nothing to do with comparative advantage. They are an attempt to deny it, not take advantage of it. The cost to our economy, including the cost to our consumers, comes over the longer term in the elimination or disabling of U.S. industries; and the market dislocations and ultimately higher consumer prices which result from the absence of effective domestic competition. One of the most interesting pieces of testimony the Finance Committee received on the textile bill, for example, was the information that within a few short months after the last U.S. producer of velveteen went bankrupt, foreign prices soared 33 percent. These costs are in addition to the economic and human costs created by dislocation and unemployment. In view of these costs and their consequences for our economy, there is no reason why our industries should not be allowed to try to recover them.

Third, the very nature of the process created by this legislation as well as the opportunity to seek damages provide a more effective deterrent than current law. If the importer knows he has a significant potential liability for his unfair actions, he may be more cautious. Further, the nature of the process is less susceptible to manipulation for political or foreign policy purposes than is the current administrative process. It is common knowledge and should come as no surprise to this committee that on occasion every Administration seeks to influence the outcome of a case because of the foreign policy consequences of a "wrong" decision. When the entire process is in the Executive Branch, those kinds of conflicts are facilitated. Providing a parallel opportunity within the judicial branch should produce greater independence.

Fourth, I reject the argument that the federal judiciary is somehow less capable than the Department of Commerce or the International Trade Commission in making these determinations. Granted, these can be complex cases that require economic analysis, but they are clearly not beyond the abilities of our judges.

In closing, Mr. Chairman, I would emphasize that this is an important bill. It addresses a serious and growing problem in a creative and effective way that supplements rather than supplants current law. Most of the criticisms concerning this approach have suggested it will not work — it will not provide faster, more effective relief. I disagree with that contention, but even if it turns out to be correct in some cases, it is not an effective argument against the enactment of this legislation. We are creating a parallel track in our law. No rights or opportunities under existing law are being removed. Complainants are being given an additional choice of tactics, and I certainly believe both current law and the judicial system can survive that opportunity. Accordingly, I urge the Committee to act favorably on the bill and bring it to the floor.

Senator HATCH [presiding]. Well, thank you, Senator Heinz.

Are there any questions?

Senator SPECTER. I have no questions, but I do thank my distinguished colleague for his support now and his continuing support on this legislation through the 97th, 98th, as well as this 99th Congress.

On the issue of speed, Senator Heinz has noted the ability of the courts to act promptly. One illustrative case is *Marathon* v. *Mobil Oil*, where U.S. district court in Cleveland disposed of a very complex factual and legal case within 6 weeks. I have seen many cases which have been disposed of very promptly, and I know Senator Hatch has, as well. It is a matter of the lawyers pushing hard and getting the job done. And once an injunction is issued, that stays in effect pending appeal, absent the filing of a supersedius, which is a great rarity because of the bonding requirements. The courts do have the capacity to act much faster than administrative bodies like the International Trade Commission.

Thank you very much, Senator Heinz.

Senator HATCH. Thank you for coming, Senator Heinz.

Senator HEINZ. Thank you, Mr Chairman, and thank you, Senator Specter.

Senator HATCH. We will now call as our first panel Barton C. Green, general counsel and secretary of the American Iron & Steel Institute, here in Washington, DC; Curtis H. Barnette, senior vice president, general counsel, and secretary of the Bethlehem Steel Corp. in Bethlehem, PA; and John Mangan, senior general attorney for international trade with the United States Steel Corp., Pittsburgh, PA.

We understand all three of you will be available for questions, but am I correct that Barton Green will be the person who will speak for the panel?

Mr. GREEN. Yes, Senator Hatch.

Senator SPECTER. One brief comment before you gentlemen begin your testimony. We had asked representatives of United Steel Workers to be present, but it was not possible for them to send the spokesman who they wanted. United Steel Workers have appeared in the past on hearings of similar legislation and have favored it.

Senator HATCH. Go ahead, Mr. Green.

STATEMENT OF A PANEL, INCLUDING: BARTON C. GREEN, GENERAL COUNSEL AND SECRETARY, AMERICAN IRON & STEEL INSTITUTE, WASHINGTON, DC; CURTIS H. BARNETTE, SENIOR VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY, BETHLEHEM STEEL CORP., BETHLEHEM, PA; AND JOHN G. MANGAN, SENIOR GENERAL ATTORNEY FOR INTERNATIONAL TRADE, UNITED STATES STEEL CORP., PITTSBURGH, PA

Mr. GREEN. Thank you, Senator Hatch.

I am Barton Green, general counsel and secretary of the American Iron & Steel Institute. With me this morning are two of my steel industry colleagues, Curtis H. Barnette, who is senior vice president, general counsel, and secretary of the Bethlehem Steel Corp.; he is on my right. And John J. Mangan, who is senior gener-

al attorney for international trade of United States Steel Corp., on my left.

Mr. Barnette is the chief legal officer of Bethlehem Steel Corp. In addition, he is a member of the Council of the Antitrust Section of the American Bar Association and is an experienced Federal court litigator.

Mr. Mangan is perhaps the most experienced international trade lawyer in the steel industry.

The three of us are appearing this morning on behalf of the American Iron & Steel Institute, which is the principal trade association of the domestic steel industry. We have amongst our members both large integrated companies, mini-mills, and specialty steel producers.

We have a joint written statement which we would like to submit for the record, if we may.

Senator HATCH. Without objection, we will put it in the record.

Mr. GREEN. And if it is agreeable with you, Senator Hatch, I will simply summarize that briefly now to provide more time for questions.

Senator HATCH. That will be fine.

Mr. GREEN. Thank you.

The bill before the committee today, S. 1655, is the most recent embodiment of a proposal that has appeared before the committee in a number of predecessor bills, several of them sponsored by Senator Specter.

The steel industry has consistently supported these bills, back as early as 1979, I believe, when a similar proposal was first before the committee.

I would refer the committee to the statements we have submitted in these prior hearings.

The steel industry, I think, is in a particularly good position to tell you our experience with the existing laws and to support this bill as an addition to the U.S. statutes that provide remedies against unfair trade practices.

I think it is fair to say that no other industry in the United States has put forth more effort and incurred more expense in an attempt to remedy unfair trade practices. Our conclusion is that the present laws provide an inadequate remedy from unfair trade practices.

We strongly support this bill as a useful addition to, and adjunct to, the existing trade statutes. It would provide an important alternative means for injured domestic industries to seek to obtain relief.

One of the principal problems with the existing antidumping statute is that relief is entirely prospective. Affected domestic industries are obliged to demonstrate that they have been injured by imports, past imports, but no relief is ever obtained with respect to those past imports. The relief, if granted, is the imposition of antidumping duties with respect to future imports. Those duties go into the U.S. Treasury. No relief is ever directly provided to the domestic industry.

We believe it is entirely appropriate that a private remedy be provided for an economic injury of this nature. There are many domestic statutes that do provide a private remedy of this type. The

antitrust laws are one example. Indeed, in the U.S. antitrust laws, there is a domestic price discrimination statute which does provide a private remedy. We believe it is entirely appropriate that there be a private remedy for injury from price discrimination where it is incurred as a result of international trade.

We also believe that it is very helpful that this bill, S. 1655, has in it a provision that would deal with customs fraud violations. This is something that we are deeply concerned about. We believe that customs fraud could seriously impede the relief to the domestic industry from the President's steel trade program.

There is evidence of transshipment of steel mill products to third countries that are not covered by the arrangements under the President's program. A private civil remedy for damages resulting from customs fraud would be a useful tool in dealing with fraud of this type.

We thank you for the opportunity to appear this morning. We would be pleased to respond to any questions you might have.

Senator HATCH. Thank you, Mr. Green.

[Statement follows:]

STATEMENT OF

CURTIS H. BARNETTE

BARTON C. GREEN

JOHN J. MANGAN

Good morning. I am Barton C. Green, General Counsel and Secretary of the American Iron and Steel Institute. I am accompanied today by Curtis H. Barnette, Senior Vice President, General Counsel and Secretary of Bethlehem Steel Corporation, and John J. Mangan, Senior General Attorney - International Trade of United States Steel Corporation. In addition to being the chief legal officer of Bethlehem Steel, Mr. Barnette is a member of the Council of the Antitrust Section of the American Bar Association and is an experienced Federal Court litigator. Mr. Mangan is perhaps the most experienced international trade lawyer in the steel industry. In view of the Committee's very full agenda today, and in order to provide more time for your questions, the three of us have consolidated our opening remarks in this statement.

We are appearing this morning on behalf of the American Iron and Steel Institute. AISI is the principal trade association for the domestic steel industry. Its members include large integrated carbon steel producers that produce a wide range of steel mill products; several companies that produce a narrow range of products - such as plate or tubulars; mini-mills - which typically operate electric furnaces and produce a relatively narrow range of low-value, commodity-type products; and companies that produce high-value stainless and specialty products. AISI members account for about 85 percent of domestic raw steel production.

The bill before the committee today, S. 1655, is the most recent embodiment of a legislative proposal that has been

consistently supported by the steel industry. Steel industry witnesses testified in 1979 and 1982 in support of predecessor proposals to amend the 1916 Antidumping Act. Most recently in May 1983, Thomas C. Graham, then chief executive officer of Jones & Laughlin Steel Company, testified on behalf of AISI in support of S. 418, the predecessor of S. 1655 in the 98th Congress. Once again, we welcome the opportunity to express the steel industry's strong support for legislation to provide a meaningful private remedy for dumping. We would refer the Committee to the statements of previous steel industry witnesses.

Mr. Chairman, the steel industry can honestly say that it supports this bill the old fashioned way - "we earned it". No industry in the United States has invested more time and effort in the pursuit of unfair trade remedies under the antidumping and countervailing duty laws. No industry is better positioned to testify that aggressive - and costly - pursuit of remedies under those laws provides an inadequate deterrent to other countries that would engage in unfair trading in our markets.

The increasingly sophisticated nature of dumping practices by foreign companies or their agents make the 1916 Act, with the proposed amendments, an important alternative means of obtaining some realistic relief. For example, the existing antidumping and countervailing duty remedies have not proved capable of dealing with situations where there is a sudden influx of dumped imports or where foreign dumpers build their initial base in the U.S. market before antidumping duties can be imposed. Current law has not been successful in combating "dump and run" tactics or where U.S. subsidiaries of exporters warehouse dumped merchandise in inventory stocks in the U.S. market. In each of these situations, the present trade laws do not provide an effective deterrent or remedy and S. 1655 would create a useful tool.

One clear reason for the recurring frustration of our efforts is that under the present Antidumping Act dumping in risk-free, since the relief is entirely prospective. If an exporter engages in dumping to a sufficient degree to induce a domestic producer to undertake the significant cost of complex

administrative proceedings, the only consequence is the imposition of duties on future imports. S. 1655 would deal with a very major gap in our laws by attaching a meaningful economic risk to a decision to dump in the U.S. market.

I would also like to touch on the compatibility of S. 1655 with the President's Steel Program announced in September of last year as a substitute for relief under the trade laws. Pursuant to that Program, the Administration has negotiated a series of bilateral export restraint arrangements with major steel exporting nations. This Program is intended to provide a temporary period of relief from the injury resulting from the disruptive and unfair trade practices of the major steel exporting nations. It covers steel mill product exports shipped prior to October 1, 1989. Given the record of our trading "partners", there is no reason to doubt that the expiration of the Program will result in a wholesale resumption of aggressive, unfair trade practices by steel exporters that are presently subject to restraint under the Program. Accordingly, the steel industry must use the period of the President's Program not only to enhance its international competitiveness but also to encourage the enactment of more effective remedies to address unfair trade practices. S. 1655 would provide such a remedy: a private action for injunctive relief or damages.

As a final point, we commend the sponsors of S. 1655 for proposing the availability of private suits with respect to injury from customs violations. We are deeply concerned about the potential undermining of the President's Program through customs fraud and evasion. Our concern was recently confirmed in the following findings of an April 1985 Report on Unfair Foreign Trade Practices by the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce:

. "United States steel companies, workers and communities have been seriously damaged by foreign producers willing to sell steel in the U.S. at prices below those charged in their home markets, and in many cases, even

below their own manufacturing cost. U.S. Government agencies in two administrations have been notably ineffective in enforcing trade laws designed to prevent these predatory practices. As the result of Congressional pressure and enhanced Customs enforcement in recent years, some of the criminal activities associated with unfair practices have been prosecuted. Mitsui and Marubeni, large Japanese trading firms, Thysson, the largest German steel producer, and Daewoo, a huge South Korean trading conglomerate, have all pleaded guilty to numerous criminal schemes designed to falsely inflate the price of imported steel reported to Customs, and thereby avoid triggering antidumping investigations."

. "The commercial incentives to evade tariffs and quotas still exist and the new steel agreements negotiated last fall and winter stand in danger of being subverted. The record raises serious doubts about the ability of the U.S. Customs Service to effectively enforce the new agreements and discourage the pattern of the fraudulent behavior exhibited over the past seven years. These concerns should not be interpreted as a minimization of the considerable efforts of the Customs Service to investigate and prosecute steel fraud over the past two years. Rather, the concerns reflect the sober realization that Customs lacks the resources necessary to enforce these broad new agreements, and at the same time, carry out all it other important duties."

These findings, and the fact that we are now seeing indications of transshipment through third countries not covered by arrangements under the President's Program, indicate that the enactment of S. 1655 would be a significant and obviously needed addition to the legal remedies available to domestic industries in the war against customs fraud.

S. 1655 poses a straightforward question: Are we really serious about our unfair trade laws? If we are, it makes eminently good sense to permit domestic industries that are being injured by proscribed practices to recover their damages from the source of the injury. It also makes eminently good sense to enact a statute that will force our trading partners to factor meaningful financial risk into their decisions to engage in predatory market conduct at the expense of United States jobs, taxes and national security.

Mr. Chairman, our international trade deficit is a cause for alarm and a reason for urgent corrective action. S. 1655 represents a worthwhile step toward attacking that portion of the trade deficit accounted for by imports benefiting from unfair conduct that violates both U.S. law and international agreements. We enthusiastically endorse this bill and look forward to working with its sponsors to encourage its enactment into law.

Thank you for the opportunity to appear before you. We will be pleased to respond to questions.

Senator HATCH. Let me address this question to any of the three of you who would care to answer it. The bill states that an aggrieved party can recover damages only if injunctive relief cannot be timely provided or is otherwise inadequate.

Can you describe for us, hypothetically, or on the basis of actual events, what circumstances would give rise to damage suits under this bill? In other words, what would constitute a lack of timely or adequate injunction relief?

Mr. GREEN. Mr. Barnette.

TESTIMONY OF CURTIS H. BARNETTE

Mr. BARNETTE. Circumstances, Senator, could certainly take place in which, if I may distinguish between an injury and a threat of injury set of facts. Circumstances could certainly be present in which imported product coming into the marketplace for a period of time has severely damaged domestic parties. In that case, it might well be that a U.S. district judge viewing that circumstance would find that the damage remedy, the wrong being so severe, would be the appropriate remedy.

On the other hand, it could well be that the circumstances presented would be ones that are more prospective in their nature, with only minimal past damage happening. In that case, injunctive relief would be granted, as we are familiar with in our Federal court system, to prevent that future wrong from taking place, and could well be entirely adequate.

I must say that I interpret the bill as permitting both, however, and could see the circumstance in which a U.S. district judge would find that the injunctive relief, while partially granted, might not be fully adequate, and he could indeed bring about remedies on both counts, both damage and injunctive relief.

Senator SPECTER. Senator Hatch, if I might amplify, the intent of the legislation is to make the injunctive relief primary, so as not to face the principle of an adequate remedy of the law, making it plain that even if there is an adequate remedy of the law, this legislation seeks to give an additional remedy of equity, because the best way to solve the problem is to stop the goods from coming in as opposed to getting involved in who suffered the damages, whether it is the steel company, the union, or the grocer down the block. If you stop it from coming in, that is the best way.

Senator HATCH. I am glad to have that clarification. One provision of S. 1655 permits the President to nullify any court order related to subsidies, dumping, or customs fraud pursuant to Presidential authority under section 203 of the International Emergency Powers Act. This is apparently an attempt to acknowledge that the President, when faced with some national emergency or conflicting vital foreign policy interest, may need to override the judgments of individual Federal courts with respect to trade policy.

Now, my question is twofold. On the one hand, is this authority broad enough to encompass the various emergencies or foreign policy interests that might arise? On the other hand, is it so broad as to permit the President to render the bill as ineffective?

I would appreciate the insight of any of you on those particular questions.

Mr. GREEN. Mr. Mangan.

TESTIMONY OF JOHN J. MANGAN

Mr. MANGAN. Senator, I think that this is probably appropriate for this legislation. I think that it is broad enough to deal with the true emergency situations that might arise where the President would truly have to act to nullify the decision the Federal district court might reach

On the other hand, I think it is circumscribed sufficiently so that you would not run into the type of situation we have under, say, section 337 of the Tariff Act of 1930, which also deals with unfair trade practices. There have been cases where the International Trade Commission has found foreign steel exporters were selling in the United States at prices below variable cost. In other words, they were engaging in predatory pricing. And they recommended, they ordered, relief against that, and yet the President vetoed it because of policy considerations. He had much broader latitude there.

I think that this, as written in S. 1655, is an appropriate degree of flexibility the President needs.

Senator HATCH. Thank you. Under current antidumping laws, an aggrieved industry may get prospective relief; in other words, an imposition of duties on future imports. This seems to provide few, if any, options to recover vast losses from the harms caused by past or prior actions.

Are there any remedies other than the hope provided by this bill to grant an aggrieved party redress for harm suffered long before an administrative ruling that tariffs are warranted?

Mr. MANGAN. There may be remedies available under the Federal antitrust statutes, but offhand I am not aware of any successful proceedings under those statutes. I think what is required is some statute that is strictly fashioned to the international trade arena. And just speaking for myself, I would like to see a bill that would specifically grant damages for the past injury, not as a secondary possibility, but one that would be as a matter of right, assuming you met the criteria and showed that the injury in fact had occurred.

Senator HATCH. I see.

Mr. BARNETTE. May I comment on that? Senator, the injunctive relief provision is the thing that is so desperately lacking in our present international trade laws. We can bring all the traditional trade remedies, the countervailing, duty and the dumping remedies, but months and months, if indeed not years, go by before final result takes place.

Here, having U.S. district court judges, Court of International Trade judges, implementing the provisions of this statute would be the paramount remedy that would be so very helpful and so desperately needed.

Senator HATCH. Thank you.

I have some other questions, but I am sure Senators Metzenbaum and Specter will ask them for me, anyway. So let us turn to Senator Metzenbaum——

Senator METZENBAUM. Mr. Chairman, I came in late. I was at a ceremony out at Georgetown honoring the South Africans who are

here. And I have an interest in the issue, but I am not knowledgeable to speak to it, really.

Senator HATCH. Thank you, Senator Metzenbaum.

We will turn to Senator Specter, then. Senator Specter, I wonder if you would take the chairman's chair, and chair this hearing, because I have got to leave. I have been happy to hear this testimony, and I really appreciate the efforts Senator Specter has put forth here, because these types of bills are difficult to draft, and this is welldrafted. It looks to me like it may be an answer. I need to study it just a little bit more, but I will probably go on as a cosponsor with Senator Specter and the others who are cosponsors. We appreciate having all of you here today.

I apologize to the other panels for not being able to stay for their testimony, but I will read their testimony and pay strict attention to it.

So Senator Specter, if you will take over.

Senator SPECTER [presiding]. There are two questions which I think would be useful to develop for the record, gentlemen. One is the inadequacy of current remedies, and the second is your experience as practicing lawyers on the speed with which injunctive relief can be obtained, providing there is a counsel which really pushes the case.

Let us start with the first question about the adequacy of existing remedies. Are they adequate, or do they take too long?

Mr. GREEN. I think Mr. Mangan could address that, and perhaps, Mr. Barnette, on the question on injunctive relief.

Senator SPECTER. Thank you.

Mr. MANGAN. I guess at the outset, Senator, I would say that but for the existing remedies, the steel imports, anyway, would be higher even than they are today. But having said that, I think we have to acknowledge that there are very serious deficiencies in the existing law.

One, of course, I have already alluded to, which is the fact that there is no right to recover for damages relating to injury already sustained.

But other ones—ones that particularly concerns me as a lawyer—deal with discovery. Over at the Commerce Department, there is a strictly limited right. Basically, it just goes to access to the responses of the foreign producer to the Commerce Department's questionnaire. And over at the International Trade Commission, there is no such right.

And I think that that leads to decisions which may not provide the full measure of relief. And in fact, I would even point out that last month at a Judicial Conference held by the Court of International Trade, a former Deputy Assistant Secretary of Commerce in charge of this area commented that the people who make the decisions at Commerce do not have the full facts in front of them. I think that highlights the need for discovery such as provided in S. 1655, where the petitioner's counsel can engage in discovery and bring to the decisionmakers the salient facts that have to be considered.

Senator SPECTER. And how long do the proceedings now take under the International Trade Commission procedures? Or, to state the question in a more pointed way, what is the longest case you

have seen come through the ITC proceedings before a decision is made by the International Trade Commission?

Mr. MANGAN. As you know, the Trade Act of 1979 does prescribe maximum limits, and there are different provisions that could be invoked to extend it. I think that in our 1982 European cases, we saw some rather lengthy proceedings where the preliminary decision was extended—it was not just the normal four months—but then the Commerce Department deemed the cases to be complex, so it went an additional period of time before the preliminary decision.

Senator SPECTER. The ITC can take a matter of years before coming to a conclusion, can they not?

Mr. MANGAN. Well, the time available to them has been limited, and it can take a little over a year, depending on what happens during the course of the litigation—from the filing of the petition until the final decision by the ITC.

Senator SPECTER. What is the longest you have seen the ITC take from the filing of the complaint to the ITC decision?

Mr. MANGAN. Well, I have not really seen the ITC go beyond the limits defined in the statute. For example, the preliminary decision by the ITC must be within 45 days after the filing of the petition, and to my knowledge, they have never missed that. Similarly, there is a really tight time schedule for their final injury decision, and it is tied to the preliminary decision by Commerce, and that also has been met.

Senator SPECTER. And after the ITC reaches its final conclusion, then how long before the President must make a finding to follow it or not?

Mr. MANGAN. Well, fortunately, in the case of a dumping or a countervailing duty proceeding, the President does not have to act—in fact, he has no authority to act. What happens is that the ITC decision goes back to Commerce, and an antidumping order or a countervailing duty order is entered. And that is within a matter of days following the final determination by the ITC.

Senator SPECTER. What was the chronology of time, if you know, on the proceeding where the President last, in September 1984, overruled the 3-to-2 decision by the ITC and rendered it nugatory?

Mr. MANGAN. I would like to ask Mr. Barnette if he would address that, since that was a case that his client actually filed.

Senator SPECTER. Mr. Barnette?

Mr. BARNETTE. Yes, Senator. I acted as the attorney in charge of the case. It was filed in very early 1984, and it took a year. We were well into the fall, September 1984. Meanwhile, imports increased at substantial volumes, and dumped—admittedly dumped and subsidized—product continued to flood the marketplace.

While I think that Mr. Mangan's responses on the typical countervailing duty process are entirely accurate, in the hands of very skilled attorneys representing the parties in these traditional trade cases, the ability to appeal those decisions and subject them to the appellate process is the thing that takes the time.

So the process does not end when there are findings by Commerce or by the ITC. In the 201 process area, indeed, it took us the better part of a year.

Senator SPECTER. What is your judgment, Mr. Barnette, as to the comparative speed of an action in a Federal district court for injunctive relief?

Mr. BARNETTE. I have unreserved confidence in our U.S. district judges, Senator, and they do not enter injunctive relief lightly, but they move on matters immediately. And where the appropriate facts are brought in the appropriate procedural framework to a U.S. district judge, I believe that they will fashion injunctive remedies within a matter of weeks, in even the most complex case. And I think the record bears that out. Certainly, the judges in our eastern district of Pennsylvania have many cases in the securities and in the environmental and the antitrust areas, and their record is an example, I think, to demonstrate what can be done in these areas.

And I should also note a provision of the bill, if I may, that forces discovery as we are accustomed to in our Federal courts. As Mr. Mangan indicated, we do not have that in trade proceedings, and it is a sorry example of failure to cooperate with the trade remedy process, that the lack of discovery and submission so often takes place.

The U.S. judge would not brook that defiance and disrespect for the process of the courts that would be operative here.

Senator SPECTER. Mr. Green, do you concur with what Mr. Barnette has said about the speed of the Federal courts on injunctive relief?

Mr. GREEN. I do indeed, Senator. If I may add a comment, an advantage of your bill is that it would tend to depoliticize the determination of the existence of economic injury, in this case from dumping or the customs fraud. It seems to me this is an advantage to all of the parties concerned. But your bill nonetheless reserves to the President the right to invalidate a court finding if he determines that there is a vital interest of the Government of the United States that is concerned.

It takes the determination away from the administration and puts it in a Federal court, and this is a very useful thing.

Senator SPECTER. Mr. Mangan, do you agree with Mr. Barnette's assessment of the speed available through Federal equitable injunctive relief?

Mr. MANGAN. I do indeed, Senator.

Senator SPECTER. Well, those are the critical questions that I see, gentlemen. If anybody has anything to add, we would be pleased to hear it.

Mr. BARNETTE. I would like to add, Senator, the very deep appreciation of my client, Bethlehem Steel, for your leadership in the whole trade area, and in particular your leadership in connection with this bill, also supported by Senator Heinz. Pennsylvania has been well led in our efforts to have fair trade in our domestic steel marketplace, and we thank you for it.

Senator SPECTER. Well, thank you, Mr. Barnette, and thank you, Mr. Green and Mr. Mangan.

I have been a litigating lawyer for many years, as you gentlemen know; I have done a lot of TRO's and preliminary injunctions, final injunctions, and if strong lawyers go into court, they can press for relief in a hurry, and you can get discovery if there is something

you need to prove. So much of the time, the proof is in the hands of the companies or the unions or the individuals which have been injured. I am reminded of the statement on the trigger price mechanism years ago where the steel companies went in with evidence in wheelbarrows and sat forever and ever and ever, and I know what strong, tough, aggressive lawyers can do in a Federal court. There is no more remedy than an injunctive relief to stop them from coming in, and then there is no argument about what happens next.

Thank you all very much.

I would like to call next the panel consisting of Mr. Larry Martin, director of public relations for the American Apparel Manufacturers Association; Evelyn Dubrow, vice president and legislative director and executive secretary of the International Ladies Garment Workers' Union, and Mr. Carlos Moore, executive vice president of the American Textiles Manufacturing Institute.

Ms. Dubrow, under the principle of "ladies first," let us begin with you. We welcome you here, commend you for your outstanding leadership and major victory which your industry achieved last week.

Thank you your cooperation.

STATEMENT OF A PANEL, CONSISTING OF: EVELYN DUBROW, VICE PRESIDENT AND LEGISLATIVE REPRESENTATIVE AND EXECUTIVE SECRETARY, INTERNATIONAL LADIES GARMENT WORKERS' UNION, AFL-CIO, WASHINGTON, DC; LARRY K. MARTIN, DIRECTOR OF GOVERNMENT RELATIONS, AMERICAN APPAREL MANUFACTURERS ASSOCIATION, WASHINGTON, DC, AND CARLOS MOORE, EXECUTIVE VICE PRESIDENT, AMERICAN TEXTILES MANUFACTURING INSTITUTE, WASHINGTON, DC

Ms. DUBROW. Thank you very much, Senator Specter.

Before I begin, I would like to say that my statement is very brief, and we would like permission to submit further testimony to your committee.

Senator SPECTER. You certainly may if you choose to do so.

Ms. DUBROW. Thank you.

My name is Evelyn Dubrow. I am vice president and legislative representative of the International Ladies Garment Workers' Union. Speaking on behalf of our more than 230,000 members engaged in the production of women's and children's apparel, I want to thank the chairman and the members of this committee for the opportunity to testify on S. 1655.

The bill introduced by Senator Specter and endorsed by Senators from both parties, including the majority and minority leaders, is of considerable importance to the members of the ILGWU. It addresses a number of crucial problems related to imports, including imports of women's and children's apparel.

Most important to us is the fact that the bill unravels some of the redtape in trade-related problems by providing for direct access to courts in order to halt dumping and subsidization of imports and customs fraud and to deter them in the future.

Subsidized and dumped imports of women's and children's apparel exacerbate the already massive growth of imports and add to the growing number of workers who have lost their jobs as a result.

In cooperation with the representatives of the American textile industry, we participated last year in a number of countervailing duty petitions filed with the Department of Commerce. We sought relief from subsidization of exports by other countries. The proceedings took a long time before a decision was reached, required arduous preparation and were very expensive. Anticipated clearcut action was vitiated when our authorities negotiated an injury agreement with the nations charged in the petition.

Customs fraud is another major area which affects the jobs of American workers. Fraud is made more possible as a means of circumventing quota agreements by the lack of sufficient numbers of customs specialists and inspectors. Although a House committee found last year that a dollar of cost to customs resulted in assessed duties and fines of more than $20, the Customs Bureau continues to show a reluctance to put additional people on the staff.

Transshipments through third countries with open quotas in order to avoid the quota limits of a particular country are not always picked up by Customs because of the shortage of personnel. Although Customs last year promulgated regulations on rules of origin, mislabeling and other fraudulent practices continue.

The concern of the sponsors of this bill that a simpler and more direct method of dealing with these problems is needed is to be commended. While the core of the problem presented by the surge of imports in the last 5 years is dealt with in S. 680, which the Senate passed last Wednesday, S. 1655 represents an important contribution to dealing with the overall problem.

Mr. Chairman, the key factors in the import problem are the abominably low wages paid in Third World supplier nations and the greed of American importers and retailers. The attached table, which lists the 20 major low-wage apparel exporting nations, shows that wage levels in these countries range from a high of 25 percent to a low of 2 percent of wages paid apparel workers in our country. And, as you know, apparel workers in the United States are among the lowest paid manufacturing workers. This factor is critical, since, on an average, labor represents one-third of the whole cost of an item of domestically produced apparel.

Our studies and direct knowledge gained from visits to apparel supplier countries have proven over and over again that the importer and retailer, not the American consumer, benefits from these low-wage imports. The cost to the importer/retailer is marked up to the retail price level of domestically produced apparel providing an enormous and exorbitant profit at the expense both of the American consumer and the American worker, who is also a consumer.

One provision of S. 1655 which appears in section 3(M) and section 5(e), raises concern on our part. It allows the President to nullify any court order related to subsidies, dumping, and customs fraud, pursuant to Presidential authority under section 203 of the International Emergency Economic Powers Act.

The danger inherent in this provision should be clear to those who have tried to use the International Trade Commission to deal

with import-related problems. If the President can vitiate a court determination, there is the danger that even with this legislation, we will go back to where we now find ourselves, namely a situation in which the President can nullify—and he has—recommendations made by the ITC.

I urge the members of the committee to examine this provision very carefully.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Ms. Dubrow.

That provision, I might say, has been certed in an effort to get administration support, and the net gain under the bill would be very substantial, because the use of it would have to be under extraordinary circumstances. It would not be too easy to apply.

I would like now to turn to Mr. Larry Martin, director of public relations of the American Apparel Manufacturers Association.

Welcome, Mr. Martin.

TESTIMONY OF LARRY K. MARTIN

Mr. MARTIN. Thank you, Senator Specter.

My name is Larry Martin, and I am director of government relations for the American Apparel Manufacturers Association.

AAMA is the central trade association for manufacturers of garments in the United States, representing about two-thirds of domestic capacity. Our members are located in virtually every State.

It is our privilege to be here today and to lend our support to S. 1655, the Unfair Foreign Competition Act. We commend you, Senator Specter, and your colleagues, for offering this legislation.

Our industry is beleaguered by imports. The apparel industry has lost 300,000 jobs to imports over the last decade. Imports now account for 50 percent of our market, and they have doubled in the last 5 years.

There are regimes available to restrain this import growth. We have full access to the current law governing subsidized and dumped imports. Customs law clearly forbids transshipment and other forms of fraud. Perhaps more importantly, the United States is a signatory to the Multi-Fiber Arrangement which, in theory at least, allows us to restrain imports which disrupt our domestic market.

Yet reliance on all these remedies has failed to provide relief from the onslaught from offshore. That is why we endorse the Textile, Apparel Trade Enforcement Act of 1985, which was approved by the Senate last Wednesday, and we are grateful to you and other members of this committee who sponsored and voted for that measure.

The bill under consideration today would provide us a valuable tool in protecting our industry and its 1.2 million workers from unfair imports. It would allow us to go into court and seek an injunction against imports which are subsidized or dumped or which violate our customs law.

In the case of subsidized or dumped goods, this bill would provide much more immediate relief, we believe, than current law.

As the law is now structured, a complaint about unfair imports is subject to a costly and lengthy administrative procedure involv-

ing both the Department of Commerce and the International Trade Commission.

The same injunctive relief would be available in cases involving customs fraud. We have no idea of the magnitude of Customs fraud, primarily transshipments, involved in apparel imports. We do know that the Bureau of Customs has uncovered numerous cases where goods were transshipped to circumvent a U.S. quota. We suspect that what Customs has caught represents merely the tip of the iceberg.

We also believe that Customs is increasingly unable to cope with major problems in this area. As I said, imports of apparel have doubled in the last 5 years, but the ranks of customs enforcement personnel have dwindled. In September 1981, customs employed 1,131 import specialists. That number had declined to 990 as of last September, and this year, Customs recommended a further reduction of 144 import specialists.

The challenge to customs enforcement was increased last year with the effective expansion of our customs territory to include Israel. The conclusion of the United States-Israel free trade agreement, we fear, has increased the possibility of apparel transshipment through that country. Now talks are beginning on a free trade agreement with Canada, the conclusion of which would mean another expansion of our customs territory with a coincidental increase in transshipment possibility.

We believe passage of S. 1655 would have the effect of extending the reach of customs enforcement personnel by allowing companies injured by fraudulent goods to seek their own redress through the court system.

We share Evelyn Dubrow's concern about the provision of S. 1655 which grants the President authority to nullify court orders. Any court order granted under the Unfair Foreign Competition Act would be an action against imported goods which violate American law. That violation would have been determined by a U.S. court, and it should not be excused for reasons irrelevant to the specifics of the case at hand.

Senator Specter, we appreciate the opportunity to be here today, and we would be pleased to answer any questions you may have.

Senator SPECTER. Thank you very much.

I would like now to turn to Mr. Carlos Moore, executive vice president of the American Textiles Manufacturing Institute.

TESTIMONY OF CARLOS MOORE

Mr. MOORE. Thank you, Senator.

I would like to submit a complete statement for the record and just summarize that statement now.

Senator SPECTER. Your full statement will be made a part of the record at this point, and we appreciate your summary.

Mr. MOORE. My name is Carlos Moore, and I am executive vice president of the American Textile Manufacturers Institute. ATMI is the national trade association for manufacturers of textiles and textiles products in the United States, and we account for more than 85 percent of production of these products.

We are pleased to be here today for the opportunity to appear before you to comment on S.1655. We believe there is a need to find a more effective remedy for problems caused by imports which are dumped, subsidized, or which fraudulently enter our markets. We have had a long history of being hurt by unfair trade practices and customs fraud.

In the past 4 years, the textile industry has filed 21 petitions charging foreign suppliers and foreign governments with either dumping or illegal subsidy practices. In most of these cases, we did not get an effective remedy. In some cases we were frustrated because foreign companies were receiving lower-priced dumped or subsidized inputs for their export production. This, as you know, has been described as "downstream dumping," and our current trade laws do not address this practice.

In other cases, the administration itself acted to frustrate our cases by encouraging and granting injury tests or suspension agreements while our cases were pending.

Because of administrative actions in cases brought by other industries, we have been unable for some time to seek remedies against subsidy practices by nonmarket economies such as the People's Republic of China.

All told, we have spent thousands and thousands of dollars, and we have achieved very little in the way of remedies.

Now, while all the unfair trade practice activity was going on, we have also been very adversely impacted by customs fraud. I share the views of Ms. Dubrow and Mr. Martin in being concerned about the performance of the U.S. Customs Service, and the amount of customs fraud that is going on. We do not know how much fraud there is out there, but we do know that the more that the U.S. Customs Service looks for it, the more that it finds.

The problem is that at present there are relatively few resources at customs allocated to effectively policing our borders to inspect shipments of textiles and apparel adequately and to stop transshipments and other types of customs fraud.

So these are the reasons why we believe that legislation which offers a course of private action in the courts against unfair and illegal practices is needed. Such action will provide a quicker and a more effective and less expensive remedy than anything currently on the books.

But in addition, I also believe that such a remedy will serve as a very important deterrent to such practices. At one time, we did not require an injury test for subsidy practices. I believe that was a tremendous deterrent keeping foreign governments from illegally subsidizing their exports. I believe that the right to private action will also be an effective deterrent. Importers will have to consider not only an exclusion order, but damages that might be assessed against them should they bring in goods in violation of this act.

So we would like to commend you, Senator Specter, and other sponsors in proposing a measure that would help to police our borders more effectively and prevent damage.

I feel that I should join my colleagues here on this panel, though, in pointing out what we believe is a serious problem with the legislation, and that has to do with the Presidential discretion provided.

We also have a long history of trying to deal with discretion provided the administration in administering the current textile import program. I can give you numerous examples of how that Presidential discretion worked against us by not applying quotas in a timely fashion to stop market disruption in the U.S. market Many of these will be submitted as part of my statement, but they involve countries such as Japan, Indonesia, Thailand, smaller suppliers as well as larger suppliers.

So, for these reasons—the reasons involving granting of Presidential discretion—we sought passage of the Textile Apparel Trade Enforcement Act. We did that primarily to overcome the kind of discretionary action or inaction that we were facing.

And I cannot mention that act without thanking you for your support in the passage of that legislation.

So I would just conclude by saying, drawing on the unhappy experience involving this kind of discretion, we would urge that the sponsors of the bill consider changing this provision. We believe that by doing so, it would provide a truly effective remedy when the tests contained in the legislation are met.

Thank you.

[Statement follows:]

Statement By Carlos Moore
Executive Vice President
American Textile Manufacturers Institute
Before the Judiciary Committee
of the U.S. Senate on S.1655,
The Unfair Foreign Competition Act of 1985
November 20, 1985

My name is Carlos Moore and I am executive vice president of the American Textile Manufacturers Institute. ATMI is the national trade association for manufacturers of textiles and U.S. products in the United States, accounting for more than 85% of production of these products. While we are concentrated most heavily in the Southeast and Northeast, we do have members throughout most of the U.S. We're pleased with the opportunity to appear before you to comment on S.1655, the Unfair Foreign Competition Act of 1985, which we believe will be helpful to our industry.

We believe there is a need to find a more effective remedy for problems caused by imports which are dumped, subsidized, or fraudulently enter our markets. The U.S. textile industry has a long history of being hurt by unfair trade practices and customs fraud. In the past four years, the textile industry has filed 21 petitions charging foreign suppliers and foreign governments with either dumping or illegal subsidy practices. In most of these cases, no effective remedy has resulted. In some of the cases, we were unable to obtain an anti-dumping duty because foreign companies were receiving less-than-market prices for inputs used in their export production. This, as you know, is "downstream dumping" and our current trade laws do not address this practice. In other cases, the Administration acted to frustrate our cases by encouraging and granting injury tests or suspension agreements while our cases were pending.

Because of Administration actions in cases brought by other industries, we have been unable to seek remedies against subsidy practices

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by non-market economies, such as the Peoples Republic of China. All told, we have spent thousands and thousands of dollars and have achieved very little in the way of remedies.

In addition to this unfair trade practice activity hurting the domestic textile industry, quota fraud was and is widespread. It is difficult to say how much quota fraud is going on, but the fact is that the more the U.S. Customs Service looks for it, the more fraud it finds. And at present, there are relatively few resources at Customs allocated to policing our borders to inspect shipments adequately and to stop this fraud.

These are the reasons why we believe that legislation which offers a course of private action in the courts against such unfair and illegal practices is needed. Such action will provide a quicker, more effective, and less expensive remedy than anything currently on the books. In addition, we believe that such a remedy will also serve as an important deterrent to future unfair practices and fraud since importers will have to consider not only an exclusion order, but damages which might be assessed against them, should they bring in goods in violation of this Act.

We would like to commend Senator Specter and the other sponsors of this legislation for proposing a measure that would police our borders more effectively and help prevent damage from such illegal imports.

However, I would like to point out what we believe to be a loophole in this legislation concerning Presidential discretion to overturn courtroom decision. This can best be done by citing examples. As you know, in the current textile import program by the Executive Branch takes discretionary action to define situations of market disruption and applying restraints. That is, the Administration has complete discretion about whether quotas should be imposed in particular cases with particular countries. This has led to doubling of textile imports in the past four

years and a job loss in the domestic textile and apparel industry of over 300,000 jobs. Foreign policy concerns often override the objectives of the program which are to prevent market disruption in the U.S. market. I can cite you numerous examples of this but I will limit myself to one or two. For example, according to the guidelines issued by the White House on December 16, 1983, quotas should have been imposed on imports of women's cotton blouses from Bangladesh over a year ago at an annual import level of 71,000 dozen. Now, Bangladesh is shipping at a level of 900,000 dozen and no action has been taken.

Japan, which is running a $50 billion trade surplus with the U.S. is currently shipping to the U.S. some 16 million yards annually of cotton broadcloth. This accounts for 25% of total U.S. cotton broadcloth production, yet the Administration has taken no quota action. Several other instances of delay and inaction are attached.

For these reasons we are urging passage of the Textile and Apparel Trade Enforcement Act of 1985, so that we can overcome discretionary inaction with respect to the textile import program. We would like also to thank you for your strong support you've shown for this legislation.

However, drawing on our unhappy experience with Administration discretion, we urge that the sponsors of S. 1655 consider removing the paragraph which grants discretionary authority. The legislation then will provide a truly effective remedy whenever the tests contained in it are met.

Thank you for the opportunity to appear before you.

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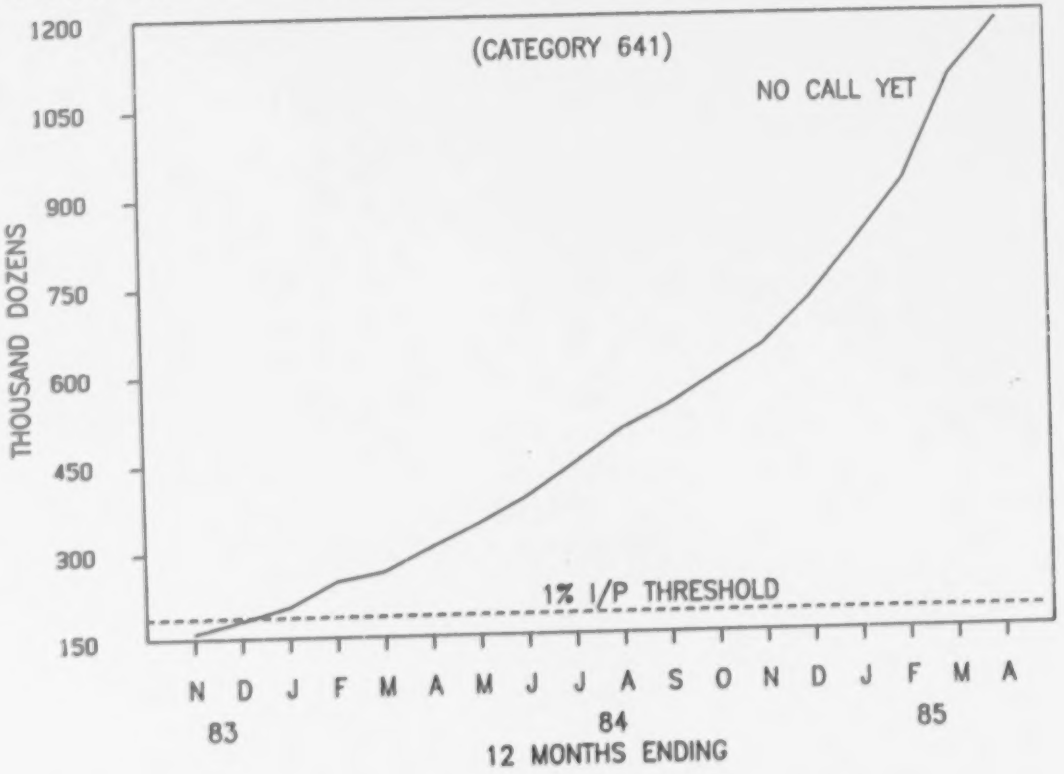
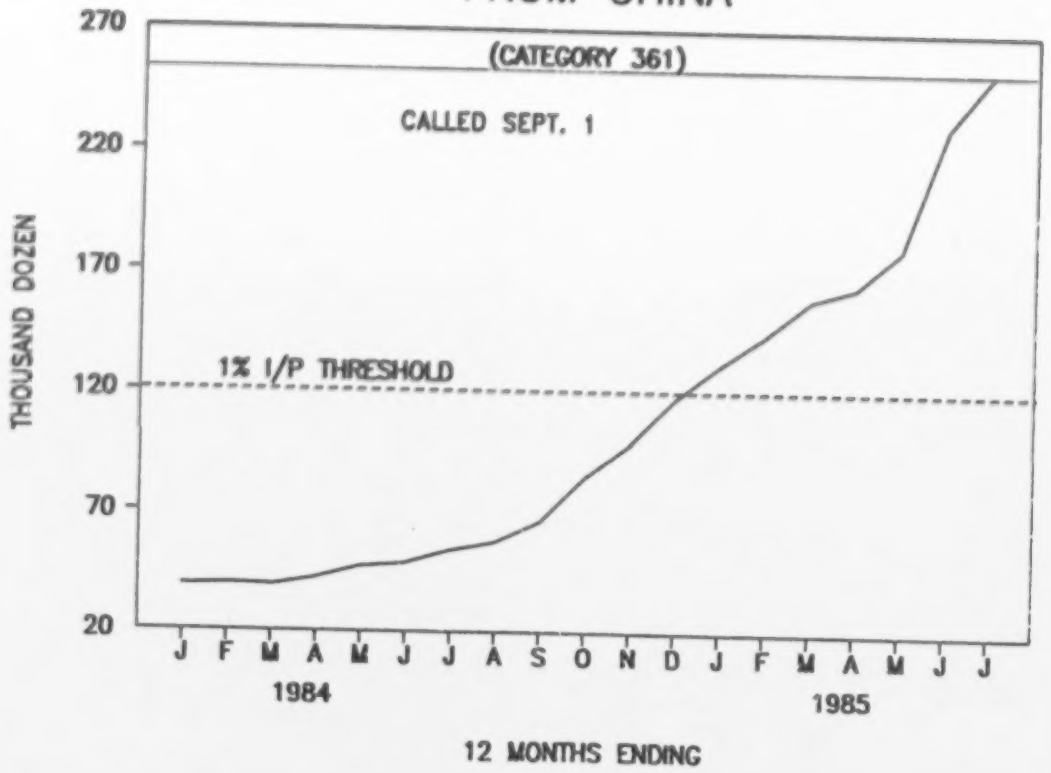
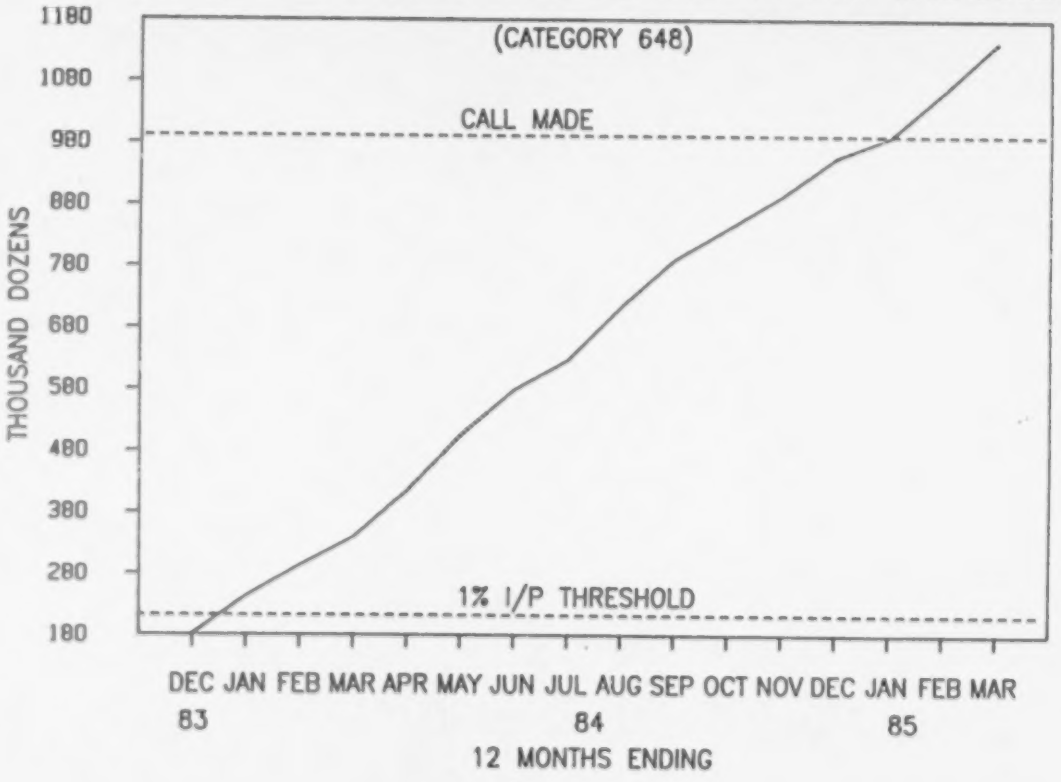
U.S. IMPORTS OF WOMEN'S & GIRL'S MAN-MADE FIBER WOVEN BLOUSES FROM INDONES



U.S. IMPORTS OF COTTON SHEETS FROM CHINA

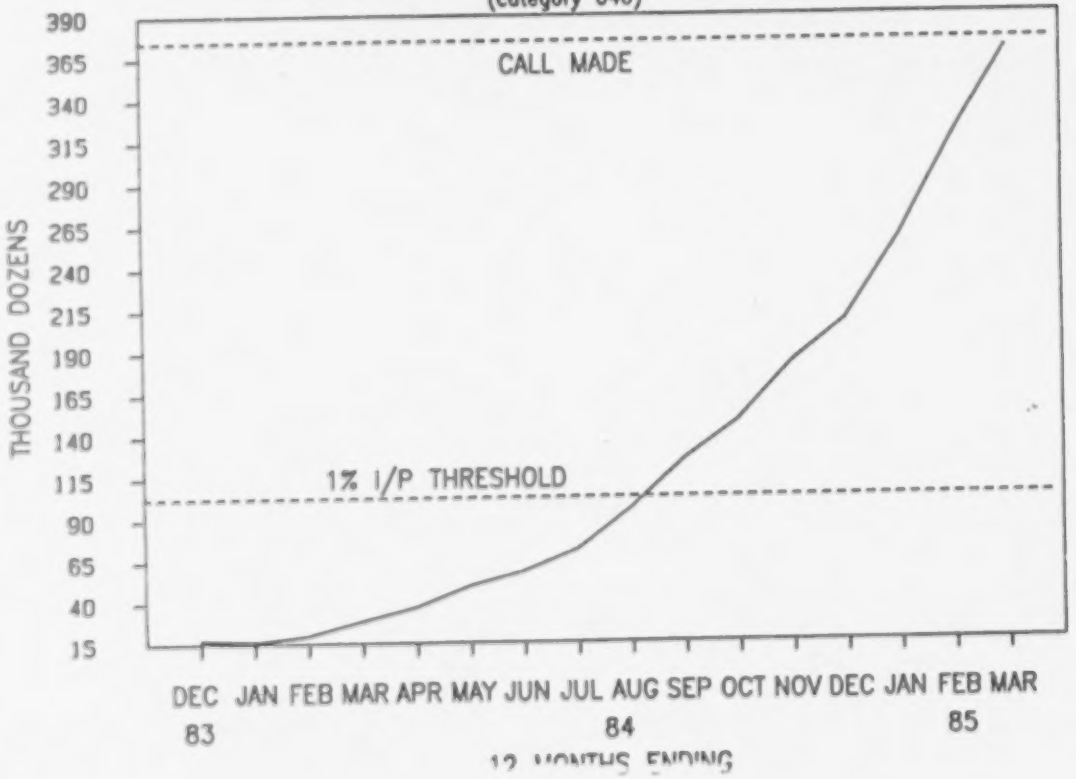


U.S. IMPORTS OF WOMEN'S & GIRLS' MAN-MADE FIBER TROUSERS FROM INDONESIA



U.S. IMPORTS OF MEN'S & BOYS' MAN-MADE FIBER WOVEN SHIRTS FROM THAILAND

(category 640)



Senator SPECTER. I have sent for the legislation specifically to read it to you and into the record at this point. It is not the kind of discretion that the President has under apparel or textile legislation. It really has to go far beyond that.

This is the language:

> Any authority granted the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States, if the President declares a national emergency with respect to such a threat.
>
> The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose.

It is a very tight reining of Executive discretion. But what we really face on the realities of it, as you know, with the legislation which we passed with 59 votes, we would give up a little to get the President's approval, because you would like to have 85 percent of a loaf rather than none at all. We are not talking about a half a loaf or none at all, and that is really what we have in mind here.

I have just one question that I know the answer to, but I would like all three of you to answer it for the record if you would, and that is, even assuming—and hopefully the legislation which the Senate passed last week will be enacted; it passed the House, and let us hope that we can get it through the Presidential signature or whatever—but notwithstanding a favorable result there, you do believe that supplemental legislation is necessary like Senate bill 1655?

Ms. DUBROW. I would say absolutely, Senator Specter. I think we need to shore up anything that S. 680 gives us by having injunctive relief and being able to go to the courts.

Senator SPECTER. Thank you, Ms. Dubrow.

Mr. MARTIN. If I could add, Senator, I think enactment of the textile bill makes this bill even more important because the incentive will be greater to commit fraud.

Mr. MOORE. I would agree completely. If the quotas that are mandated in S. 680 are put into effect, this bill would be very, very helpful and an important means to try to stop the kind of customs fraud that would probably ensue.

Senator SPECTER. Thank you all very much.

My learned counsel, Neal Manne, has just reminded me—he has not reminded me; he has informed me—that the provisions of the President's emergency powers would apply, whether or not we put them in this bill.

Thank you all very much.

I would like next to call the panel consisting of Mr. Robert C. Cassidy, partner in Wilmer, Cutler & Pickering; Mr. Richard Cunningham, partner in Steptoe & Johnston; and Mr. Peter Ehrenhaft, partner of Bryan, Cave, McPheeters & McRoberts, all from Washington, DC.

Gentlemen, we thank you for joining us here to give us your expert testimony. We are delighted that we do not have to respond to your hourly billings for all the time that you have waited.

Let us begin in alphabetical order as you are listed on the panel, and start with you, Mr. Cassidy.

STATEMENT OF A PANEL, INCLUDING: ROBERT C. CASSIDY, PARTNER, WILMER, CUTLER & PICKERING, WASHINGTON, DC; RICHARD O. CUNNINGHAM, PARTNER, STEPTOE & JOHNSTON, WASHINGTON, DC; AND PETER D. EHRENHAFT, PARTNER, BRYAN, CAVE, McPHEETERS & McROBERTS, WASHINGTON, DC

Mr. CASSIDY. Thank you, Mr. Cassidy.

My name is Robert Cassidy, and I am a partner in the law firm of Wilmer, Cutler & Pickering, here in Washington, DC. I have a prepared statement that I will submit for the record, and I will summarize the major points.

Senator SPECTER. Yes. All statements will be made a part of the record automatically, and summaries would be very much appreciated.

Mr. CASSIDY. Thank you, Mr. Chairman.

Mr. Chairman, in my opinion, if the United States does not dedicate significant additional resources to the effort to prevent customs fraud and create additional disincentives to the commission of customs fraud, then our international trade regulatory statutes are doomed to fail to achieve the purposes for which Congress enacted them.

The Congress has spent an enormous amount of time in the past few years in refining our international trade regulatory statutes, but this effort will go for naught if the statutes cannot be effectively implemented. Implementation of our trade statutes is achieved through border controls, tariffs, and quotas. In order to achieve the purposes of the trade statutes, these border controls must be applied to carefully defined categories of goods; they must be applied to the products of specified countries; they must be applied to products of specified foreign companies; and they must be applied to products of a specified value in many instances.

In order to achieve the purposes of the trade laws, obviously, the border controls have to be applied to the correct goods. This is axiomatic.

The problem, however, is that the imposition of border controls is not automatic. It depends upon the accurate completion of customs entry documents by foreign exporters and by domestic importers, and it depends upon careful review of these documents by customs officials.

Even if everyone were honest, the enormous volume of imports and the complexity of our international trade regulatory system is such that the correct application of border controls would be a monumental task. The difficulty is that our regulatory regime creates tremendous incentives for foreign exporters and domestic importers to submit false statements to the Customs Service for the purpose of evading tariffs and for the purpose of evading quotas.

There are existing criminal and civil penalties for customs fraud. The difficulty in the civil area is that the customs civil penalties statute, section 592 of the Tariff Act of 1930, can only be invoked by the Customs Service. If a private party becomes aware of Customs fraud being committed, then its only recourse is to bring the fraudulent behavior to the attention of the Customs Service. The Service may or may not proceed on the matter. That is a matter left solely to the discretion of the customs officials. Given that

there are too many instances of fraud and too few customs officers available to investigate fraud, the fact is that most allegations of fraud are not thoroughly investigated, and even when they are investigated and when the civil penalty is imposed on the person committing the fraud, the remedy is such that it does not compensate the private interests in the United States who have been injured by the customs fraud.

Section 5 of S. 1655 would, in my opinion, be a significant improvement in our antifraud statutes. It would provide supplemental resources in the effort to combat customs fraud by giving private parties a cause of action in Federal district court or the Court of International Trade when they become aware of the commission of customs fraud. I think this is totally appropriate. The private parties are the ones who are injured by the fraud directly. Furthermore, they are often in the best position to become aware of the commission of fraud.

Second, S. 1655 would create a significant additional disincentive to the commission of fraud. That is, the possibility that damages may be collected by the private parties in the United States who are injured by fraud.

Thus, S. 1655 would provide the additional resources that are necessary and would create the additional disincentive to the commission of fraud which are necessary. Taken together, I think these things would increase the effectiveness of our trade regulatory regime.

Senator SPECTER. Thank you very much, Mr. Cassidy.

[Statement follows:]

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

TESTIMONY OF

ROBERT C. CASSIDY, JR.
Wilmer, Cutler & Pickering
Washington, D.C.

In the Hearing to Consider S. 1655,

"THE UNFAIR FOREIGN COMPETITION ACT OF 1985"

November 20, 1985

Mr. Chairman, members of the committee, thank you for inviting me to testify before you today on S. 1655, the "Unfair Foreign Competition Act of 1985." I intend to address my remarks to Section 5 of the bill which provides for a private cause of action against customs fraud. My experience in both government and private practice leads me to conclude that there is a definite need to supplement existing penalties for customs fraud. Section 5 of S. 1655 would provide such a supplement by allowing private parties who are injured in their businesses by customs fraud to act directly against those who commit the fraud by means of an injunction or damages for the injury they sustain.

The United States, like most other industrial countries, regulates imports for a variety of reasons: To prevent injury to domestic producers caused by competition with imports subsidized by foreign governments; to prevent injury to domestic producers caused by certain international price discrimination or "dumping"; to prevent injury to domestic producers by fairly traded imports that increase too rapidly; to prevent injury to domestic patent holders caused by imports that infringe their patents; and so on.

In every case, these regulatory objectives must be implemented at the border by tariffs or quotas. In every case, the tariffs or quotas are applied to categories of products that are carefully defined to achieve the prescribed policy goals. For example, countervailing duties are applied to a

defined category of goods produced by a subsidized manufacturer in a specific country.

If our trade laws are to achieve the purposes for which they were enacted, it is essential that tariffs and quotas be applied to the proper category of goods from appropriate countries and companies.

This seems axiomatic, and it is. The problem is that implementation of border controls is not automatic. It depends upon accurate completion of Customs entry documents by foreign exporters and domestic importers and careful review of these documents by U.S. Customs Service personnel. Even if everyone were honest, the enormous volume of imports into the United States would make correct implementation of border controls a monumental task for the businessmen and government officials involved.

The problem is compounded by the fact that not all exporters and importers are honest. Our regulation of trade through border controls often creates a significant incentive to make false statements to the Customs Service. For example, if there is a 50 percent countervailing duty on widgets from country X, an unscrupulous exporter or importer of those widgets can evade that duty by declaring that his widgets are not widgets but some other product. He can also evade the duty by declaring that his widgets originate in some country other than country X.

The nature and extent of this type of tariff and quota fraud has been thoroughly investigated by various congressional committees.1/ In the textile area, for example, five major methods were found to be used to avoid import quotas which the United States has established under the Multi-Fiber Arrangement: Transshipment to falsify country of origin, false product description, counterfeiting foreign government export visas, counterfeiting products, and smuggling. Specific examples of fraud which were uncovered include (1) declaring t-shirts with an easily detached piece of fabric at the bottom as dresses because the t-shirt quota was full; (2) claiming to

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1/ E.g., House Comm. on Government Operations, Federal Enforcement of Textile and Apparel Import Quotas, H.R. Rep. No. 99-305, 99th Cong., 1st Sess. (1985); Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 99th Cong., 1st Sess. (1985), Unfair Trade Practices: Criminal Components of America's Trade Problem (Comm. Print 99-H).

add value in the Virgin Islands when goods were merely transshipped to avoid tariffs; (3) hiding suits in shipments of coats and trousers because a suit quota is full; and (4) claiming that the fiber content of garments is 55 percent ramie in order to avoid quotas when the actual ramie content is 32 percent.

The Steel Trigger Price Mechanism was found to have broken down because, among other fraudulent practices, certain steel importers falsely inflated invoice prices on documents filed with the U.S. Customs Service in order to evade the application of the trigger price mechanism or to evade outstanding antidumping orders. Practices which were used to account for the differences between the actual and reported prices included contract cancellation schemes, secret commission payments, false exchange rate agreements and false insurance claims.

Existing law provides criminal and civil penalties for the kinds of fraud I have described.[2/] The problem is that the existing civil remedy can only be invoked by the U.S. Customs Service. Even when it is invoked, the existing civil penalty does not compensate domestic companies for the injury they have incurred as a result of fraud.

We are all well aware of the increased workload which the Customs Service has acquired in recent years. Given the increase in import volume, simple processing, much less the detection of fraud, has become extremely difficult given the limited resources of the Customs Service. Recognizing that existing mechanisms for detecting fraud were inadequate, the Customs Service established a Commmercial Fraud Investigations Center in February 1983. The experience of the Fraud Center and other recent Customs initiatives against fraud, such as "Operation Tripwire", shows the extent to which customs fraud is occuring.

Despite Customs' efforts under the existing system, which relies solely on U.S. Government enforcement of the antifraud statutes, it is extremely unlikely that Customs fraud can be adequately addressed. If a private party has reason to believe customs fraud is being committed, his only recourse is to bring whatever information he has to the attention of the Customs Service. Whether the Service proceeds on the matter is

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2/ E.g., Sections 541 and 542 of Title 18, United States Code; Section 592 of the Tariff Act of 1930 (19 U.S.C. § 1592 (1985)).

left solely to the discretion of the Service. There are too many fraudulent transactions and too few Customs agents for the Service to investigate most allegations of fraud. Unless we improve the enforcement mechanism to penalize effectively more of those exporters and importers who engage in fraud, our trade laws are likely to exist on paper only.

Section 5 of the "Unfair Foreign Competition Act of 1985" establishes a private enforcement action for parties which are injured by behavior prohibited by the existing civil penalty statute for customs fraud, section 592 of the Tariff Act of 1930. Enactment of section 5 would permit the private sector to supplement the resources of the Customs Service in the effort to stop customs fraud. This is totally appropriate. U.S. industry is directly impacted by customs fraud. U.S. industry has the resources to act against customs fraud through the courts. And U.S. industry often has the market intelligence to know when fraud may be occurring.

Section 5 of S. 1655 would be a valuable supplement to current law. Parties being injured by customs fraud would be able to file civil suit in the district court of the District of Columbia or in the Court of International Trade. Plaintiffs would be able to develop their case and defendants would be able to document their defense through discovery procedures. Where fraud is established, the court could grant equitable relief, including an injunction against further imports, or an award for damages sustained.

A private cause of action against customs fraud will serve as an additional deterrent against fraud violations occurring in the first place. In consequence, those industries which have been granted some form of import relief would be more likely to realize the benefits of that relief.

In conclusion, a private cause of action against customs fraud, such as section 5 of S. 1655, would be a useful addition to the antifraud statutes that are essential if our trade laws are to achieve the purposes for which they were enacted.

Senator SPECTER. We will now turn to you, Mr. Cunningham.

TESTIMONY OF RICHARD O. CUNNINGHAM

Mr. CUNNINGHAM. Senator Specter, I think you know how strongly I support a provision creating a retrospective damages remedy to supplement the administrative remedies for dumping. I have testified three times in the last 5 years on this provision, based on my experience that the current prospective administrative remedies leave some severe loopholes—at least three important ones that I can think of—in the coverage of the antidumping laws.

I have testified in previous hearings about the problem with sudden influxes of imports. The problem, I submit, in that situation is not so much that you have a 4- to 7-month delay between the time that you file an administrative case and the time you get the administrative provisional remedy. The problem is that you do not even get to the filing of a case until you have adequately prepared it so that the administrative agency can move on it. And that is going to be, under the best of circumstances, somewhere between 8 months and 1 year after the sudden influx of imports has begun, and the damage in that case is very largely done in some situations.

I have testified in past hearings about the plight of the Moped industry, which was devastated by just such a sudden influx of imports, and which found the prospective remedy provided by duties absolutely inadequate because the imports were already in the country.

A second situation not covered by the law is what I have referred to in past testimony as inventory dumping. More and more foreign manufacturers are setting up in the United States subsidiaries which import the product, warehouse it in the United States, and then resell it in the United States. The dumping does not occur until the sale by the subsidiary in the United States. At that point, the foreign merchandise is already in the country, and it is no earthly good to impose duties on it. I think you, Senator Specter, are particularly familiar with that problem because of the plight of the American motorcycle industry, with Japanese inventory pricing of precisely that magnitude, which led us—reluctantly, because we would have preferred to do it as a dumping case—to the much more difficult road of an escape clause remedy.

Finally, present law provides no real remedy for the single massive sale awarded to a foreign company in something like a subway car contract or a steam turbine generator contract. Sure, duties may be imposed if the importation is delayed long enough after the award of the sale, but that certainly does not get the contract back for the U.S. industry. The contract is lost; the damage is done.

In all of these cases what is needed is a retrospective remedy, and this need for a retrospective damage remedy is the reason I continue to support measures to revitalize the Antidumping Act of 1916.

I am disturbed, however, at the shift in emphasis here to an injunctive remedy to be preferred over damages. Indeed, am not even sure that you would get a damage remedy in most cases. I think

you do not need that emphasis on injunctions, and I think it is not really what you want. The thing that will really get the attention of foreign companies that are considering their pricing policies in the United States more than anything else that I can think of is the first large damage award that occurs under this statute.

As you know, Senator, I represent in some cases foreign industries and in some cases, U.S. industries, and I counsel foreign companies from time to time. In any such counseling situation, it is very rare that 5-minutes elapse before I am asked, is there a damages remedy, a retrospective remedy, a retroactive remedy of some kind. And the answer clearly is no. The import of that question clearly is, Are we vulnerable in our pricing at the time before a case is brought? Can we continue to price at whatever level we want before a case is brought, because nothing will be retroactively applied to us?

And the answer to that under present law is retroactivity. The answer under this legislation should be yes, there is a retroactive liability in damages and I should be able to tell foreign exporters, you are going to have such exposure regardless of whether there is an injunctive remedy or not. You are going to be exposed to a damages remedy if you are shown to have injured U.S. industry by unfair pricing prohibited by this law.

I am concerned also that shifting the emphasis to an injunctive remedy may undermine the GATT legality of this legislation. As you know, people are going to come in and test it as GATT illegal. I have taken the position, and I continue to take the position, that a damages remedy, a private remedy of one company against another company is not what the GATT deals with. The GATT deals with governmental restrictions of trade flows, governmental restrictions on imports. By moving this toward an injunctive remedy as the primary remedy, I am afraid you leave yourself open to the argument that this is in fact a government restriction of import flows that the GATT in some way prohibits.

I also think you weaken the grandfathering argument because you change the Antidumping Act of 1916 to such a significant extent that the grandfathering argument might not be available to you.

So I would strongly support this legislation in a form which would return it to a primary damages remedy with injunction available to the extent, as under normal law, that the damages remedy is inadequate.

Senator SPECTER. Thank you, Mr. Cunningham.

[Prepared statement follows:]

STATEMENT OF RICHARD O. CUNNINGHAM

My name is Richard O. Cunningham. I am a member of the Washington law firm of Steptoe & Johnson. In testifying today, I am presenting views which are entirely my own and should not necessarily be taken as representing the views of my firm or of any of our clients.

This is the third occasion in the last five years on which I have testified in support of a judicial remedy in damages for injury caused to American corporations by dumped imports. My support for such legislation remains firm. It is based upon my experience that the current prospective administrative remedy is inadequate to deal with several important -- and not at all infrequent -- dumping situations.

My testimony today will consist of two parts. First, I want to reemphasize the need for a private remedy in damages for injury caused by dumping. Second, I want to suggest certain changes in S. 1655 which, in my view, are necessary both from the standpoint of international trade policy and from the standpoint of legality under the General Agreement on Tariffs and Trade ("GATT").

I. The Need for a Damages Remedy

A major inadequacy of the present administrative remedy for injury caused by dumping is that administrative relief in the form of duties is entirely prospective. In a number of circumstances, some of which are becoming increasingly common, the unavailability of any retrospective remedy for injury caused by imports which enter the United States before an antidumping proceeding can be commenced means that there is in fact no remedy at all.

It is important to understand that the problem is not that administrative relief is unduly delayed by overly lengthy proceedings. Duty liability can attach as early as 160 days after the filing of a petition in an administrative case, and in certain circumstances as early as 90 days after filing. It is highly problematical whether any judicial remedy -- temporary restraining order or preliminary injunction, for example -- could realistically be obtained in a significantly shorter period of time.

The real problem is that, except in rare instances in which a very limited retoractive application of duties may be possible, dumped imports can enter the United States with impunity, causing injury to U.S. producers, up to the time when an antidumping proceeding is commenced. This is a very

serious deficiency, since the bringing of an antidumping petition is not a simple matter which can be accomplished in a short period of time. Therefore, even where the affected domestic corporation is unusually alert and acts as promptly as possible, substantial injury can be done by the dumped imports before any proceeding can be commenced. Typically, the scenario is as follows:

- The foreign producer begins to market its products in the United States, often with rather rapid initial success, owing to the low level of the dumped prices.

- A period of several months (rarely less than six months) elapses before competing U.S. manufacturers begin to be aware that significant business is being lost to low-priced foreign competition. It is only at this point that the search for a remedy against unfair pricing begins to be contemplated.

- Over the next month or so, the affected U.S. corporation holds discussions with counsel, first with its in-house or local attorneys who are not experienced in international trade law, and then with an international trade law specialist.

- The international trade law specialist then identifies possible dumping as a source of the problem, and an investigation is commenced to determine whether foreign home market price levels and/or cost of production are higher than the prices at which the imported merchandise is being sold in the United States. This investigation normally takes at least three months, and can take as long as six months. Contemporaneously, data concerning injury caused by dumping is compiled and evaluated.

- Upon completion of the investigation of foreign market conditions, it is necessary to evaluate the data obtained and to draft an antidumping petition. This requires an additional one to two months, after which another month is generally consumed in discussing the draft petition with the Department of Commerce and the International Trade Commission preparatory to filing.

As the foregoing scenario demonstrates, it is rare that an antidumping petition will be filed sooner than a year after the dumped imports first enter the U.S. market. It is this period -- the period prior to filing of the petition -- which constitutes the real "loophole" in the administrative antidumping law. In at least four circumstances, this pre-filing injury can be so significant that the prospective duty remedy is wholly inadequate. In effect, the horse has escaped before the barn door can be shut.

Sudden Influx of Imports

One obvious situation in which a prospective remedy is inadequate is the case of a sudden influx of imports into the U.S. market. The unhappy story of the United States moped industry in the late 1970s is a classic example of such a situation.

In the mid-1970s, it looked as if the U.S. moped market was going to enter a genuine "boom" period. The anticipation of this "boom", of course, was based on the effect of the oil embargo by the Arab nations, the subsequent gasoline price increases, and the consequent desire of many Americans to purchase transportation vehicles which were more economical and used less gas than automobiles. Mopeds are among the most economical of all vehicles. Some can get as much as a hundred miles on a single gallon of gas.

The U.S. moped manufacturers seemed to be well-positioned to participate in the expanding moped market. Then came a trade problem which disrupted the U.S. market and forced the U.S. manufacturers to defer development programs and to cut back production.. It was a case of clear, sudden and massive dumping -- yet there was no remedy whatsoever under any U.S. trade law.

By late 1977 and early 1978, it became apparent that moped manufacturers around the world had over-expanded capacity. Demand for mopeds had risen substantially, but not as rapidly as the various manufacturers had apparently anticipated. The result was a sudden and massive influx of mopeds into the country with the largest potential market and the most open market -- that is the United States. Within the space of a few months, about 500,000 mopeds were brought into the United States and inventoried for resale here. This was an enormous influx, in view of the fact that total U.S. moped sales at that time were between 250,000 and 300,000 units per year and imports prior to 1978 had been running below 200,000 units per year. In other words, two years' supply of mopeds surged into wholesalers' warehouses within a few months. These vast numbers of vehicles could only be sold by drastically cutting their prices far below wholesale market prices and far below the prices that U.S. producers could meet on any economic basis. It was nothing short of a market disaster.

In the face of this sudden influx of imports and rapid build up of inventories, my law firm was asked to examine the possibility of filing a petition under the Antidumping Act of 1921. After extensive research, however, we were forced to conclude that no remedy existed under that statute. The substantial quantities of mopeds had already been imported into the U.S. and were sitting in wholesale warehouses and showrooms. Although the domestic industry could undoubtedly have proven dumping, since foreign market prices were very substantially higher than those at which the foreign

merchandise was being sold in the United States, the prospective remedy would not affect the imports which had already entered the country, nor could it provide recompense for the damage already done to the U.S. industry.

"Hit and Run" Dumping

The present administrative antidumping law is also inadequate to deal with "hit and run" dumping, a phenomenon which occurs frequently in cyclical and seasonal markets. The cyclicality issue arises in a number of capital-intensive industries, and the seasonality question is most relevant to agricultural trade.

Many manufacturing industries are subject to sharp and sometimes sudden cyclical downswings in demand. Where such a sudden downswing occurs in a foreign producer's home market, there is a major incentive -- especially for a highly capital-intensive producer who must keep his utilization levels as high as possible -- to increase export sales, even at the cost of reducing prices significantly below fully-allocated costs. The most frequent target for such an export campaign is the United States, which offers a large and generally unrestricted market. Where the downswing occurs suddenly, the influx of imports is often equally sudden, with the result that the damage to U.S. producers is done before an antidumping proceeding can be prepared and filed. Then, by the time the antidumping action is commenced, the market cycle has started up again and the imports have withdrawn, so that prospective relief is no longer needed.

A similar phenomenon occurs in agricultural markets. At the height of the growing season, farmers in Mexico, Canada or other major agricultural producing nations may have substantial surpluses of products that cannot be sold in their home markets. Here again, the large and open U.S. market provides an inviting target for dumping this excess production at distress-sale prices. This, however, is even more clearly a case in which the sudden influx of imports -- while highly injurious -- is of such a brief duration that no prospective remedy can be effective.

Inventory Dumping

From a long-term standpoint, I believe that the most serious deficiency of the present prospective antidumping law lies in its failure to deal with "inventory dumping". More and more foreign manufacturers are setting up subsidiary companies in the United States to import, inventory and sell merchandise manufactured in the parent company's foreign plant. In such a

marketing system, dumping does not occur until the merchandise is sold out of inventory in the U.S. market by the foreign manufacturer's U.S. subsidiary or affiliate. In other words, the dumping does not occur until long after the merchandise has been imported into the United States, long after the point where it can be subjected to antidumping duties. This gives to the foreign manufacturer who wants to build a major U.S. market position through dumping a means of accomplishing that goal without any risk whatsoever that the administrative antidumping law will be applied to prevent or correct the disruption caused by his tactics.

Harley-Davidson Motor Co., Inc., the last remaining American motorcycle manufacturer, has been a prominent victim of such "inventory dumping". In the late 1970s, Harley-Davidson sought to deal with this problem by bringing a proceeding under the Antidumping Act of 1921. In the mid and late 1970s, the Japanese motorcycle manufacturers had used these "inventory dumping" tactics to increase their market share in the heavyweight sector of the American motorcycle market. In response to Harley-Davidson's petition, the Department of the Treasury found this price cutting to have constituted dumping with substantial margins on a volume of sales equal to some 15 percent of the U.S. motorcycle market. Despite this favorable determination by Treasury, however, the International Trade Commission found no injury cognizable under the Antidumping Act, and I must say that I can understand how that decision was reached despite the large volume of dumped sales and the high dumping margins. Keep in mind that Harley-Davidson was unable to present its case against the widespread price cutting on Japanese motorcycles until long after the imports had entered the United States. The Japanese made much of this at the ITC hearing. They emphasized that the dumping margins had been found on motorcycles which had already been imported and which would not be subject to imposition of dumping duties even under a 90 day retroactive application of those duties (which, incidentally, Treasury had not ordered). In response to such arguments, the Commission rendered a negative determination.

In 1983, Harley-Davidson turned to another statute -- the escape clause -- for relief from greatly increased Japanese "inventory dumping". In a period of two years prior to the filing of the Section 201 petition, the four Japanese motorcycle manufacturers had radically increased their shipments to the United States. Indeed, they doubled their import levels

at a time when demand in the U.S. market was declining. As a consequence, they built up inventories in the United States to more than 1-1/2 times total U.S. annual market demand. This was something on the order of three times the level of inventories normally carried by a motorcycle manufacturer. Then they began drastically cutting prices, and the price cuts were just as severe as the inventory build-up. Harley-Davidson was able to document instances in which the imported motorcycles were being offered to U.S. dealers at price reductions as great as 70 percent!

As this Committee is undoubtedly aware, Harley-Davidson was successful in its escape clause petition. But it should never have been necessary to bring the case under that statute. This was a clear case of unfair, dumped pricing and U.S. law should have been able to deal with it as an unfair practice case. A judicial remedy in damages, retrospective in nature, would have obviated the need to resort to the extraordinary measure of seeking escape clause relief.

Massive Contract Dumping

In a number of industries, the merchandise produced and sold is so large and so high-priced that the market is characterized by a very few immense sales each year. Examples of such industries are nuclear power plants, steam turbine generators, subway cars and jet airliners. Because these industries are highly capital-intensive, with a concomitant incentive to keep plants as fully loaded as possible, there is a tendency for dumping to occur rather frequently. Ironically, however, the present prospective antidumping law provides almost no relief for U.S. manufacturers in such industries, to the point where they have rarely attempted such cases and have been largely unsuccessful when cases have been brought.

The problem is that the injury is not caused by the importation of the merchandise but by the loss of the huge contracts. Once the U.S. purchaser has awarded the contract to the foreign manufacturer, imposition of duties -- even very severe duties -- on the imported merchandise is of no help to the aggrieved U.S. company. Once the contract is lost, the damage is done to the U.S. manufacturer, and imposition of duties will only hurt the parties to the contract, not obtain the business for the U.S. company. The U.S. subway car industry's frustrations with antidumping proceedings in recent years testifies to the inadequacy of the law to deal with the massive contract type of dumping problem.

In Summary - The Need for a Retrospective Damages Remedy

The examples discussed above demonstrate that an antidumping law whose remedy is entirely prospective is inadequate to deal with the dumping problems encountered by American industries. A retrospective remedy in damages would constitute a major improvement, for two reasons:

First, and most obviously, it would allow injured U.S. industries to obtain compensation for a wrong which has been done to them by a foreign manufacturer's unfair pricing. Indeed, the need for and the logic behind such a damage remedy is so compelling that I cannot see how it is controversial at all. International law and U.S. law have both made it clear that dumping is an unfair practice in international trade. If an unfair practice injures a U.S. company, there is no earthly reason why that company should not be recompensed in damages by the perpetrator of that unfair practice.

Second, and perhaps more important in my mind, the existence of potential liability in damages will have a pronounced effect on the pricing policies of foreign exporters. If damages are available to U.S. manufacturers for harm caused by all the foreign exporter's dumped sales, even those which occur before a proceeding is commenced, the foreign companies will be aware that they no longer have a free "first bite at the apple". They will have to do what U.S. sellers have done in order to comply with the Robinson-Patman Act -- that is, they will have to monitor their pricing policies in the United States to avoid discriminatory or below-cost pricing. I can think of no more meaningful and beneficial addition to the U.S. import relief laws than an antidumping damages remedy.

II. Suggested Changes in S. 1655

Somewhere along the line, this legislation has gotten badly off track. What is needed is a retrospective private remedy in damages for American companies injured by the unfair acts (dumping) of foreign companies. Prior versions of this legislation were directed at satisfying that need. The present bill, however, has been drastically changed. It is now a remedy which is principally prospective in nature, in the form of injunctive relief, with damages available only where injunctive relief cannot satisfactorily resolve the problem. Moreover, it extends beyond the unfair acts (i.e., dumping) of the foreign exporters who would be defendants in such litigation to include as well the unfair subsidization of those companies by foreign governments which would not be defendants in the litigation.

In my view, these changes are unwise, and the bill should be returned to its original form and purpose. The changes are unwise, not only because they go far beyond the remedy deficiency which gives rise to this legislative initiative, but also because they undermine the legality of this legislation, making it inconsistent with our country's obligations under the General Agreement on Tariffs and Trade ("GATT"). My concerns on these subjects, along with specific suggestions for revision of S. 1655, are set forth below:

A. The primary judicial remedy should be damages.

I urge in the strongest terms that S. 1655 be revised to make damages the primary remedy, with injunctive relief available only to the extent that damages are insufficient to remedy the harm done to the plaintiff corporation by the foreign defendant's dumping. As discussed above, it is the need for such retrospective relief which justifies this legislation. The situtations discussed above make it clear that the injury which at present has no remedy under U.S. law is that which occurs between the time the dumping commences and the time a proceeding can be instituted. That injury can be remedied only through damages, and the great defect of S. 1655 is that it makes damages unavailable in most cases.

The argument for creating a further prospective remedy in the form of injunctive relief strikes me as exceedingly weak. The present administrative procedures provide that such relief will become effective in the normal case within five months after the petition is filed, and in addition offer the prospect that duties can be made retroactive to a point 90 days before the filing of the petition, provided that certain showings are made. For a judicial injunctive remedy to be a superior form of prospective relief, it would have to be clear that such injunctive relief would be granted more frequently than are retroactive duties under today's statute, and that injunctive relief would be forthcoming in the majority of cases well before five months after the commencement of the lawsuit. I seriously doubt that either of these arguments can be made successfully on behalf of this legislation.

In evaluating prospects for injunctive relief, it must be remembered that determining whether and to what extent dumping is occurring is a difficult and extremely uncertain analysis. One has only to take note of the wide swings in dumping margins between the preliminary and final determinations by the

Department of Commerce in case after case to appreciate the uncertainties inherent in this analysis. Because of the difficulty of the dumping analysis; I seriously doubt that it would often be possible to obtain temporary restraining orders or even preliminary injunctions without first conducting extensive discovery as to the foreign producer's home market prices and costs. Without such discovery, the plaintiff would be unable to carry the burden of demonstrating a substantial likelihood of prevailing on the merits of the litigation, a burden necessary to the granting of injunctive relief. Therefore, most if not all injunctions under this statute would be issued after extensive discovery, which necessarily means that it would take substantially longer than five months to obtain such relief. In short, injunctive relief not only fails to address the need for a retrospective remedy, it is also unlikely to bring about more expeditious prospective relief.

This bill's shifting of the emphasis from damages to injunctive relief also jeopardizes its legality under GATT. Indeed, it makes unavailable both of the major arguments upon which the previous bills' GATT legality has been predicated.

The major argument for GATT legality of a private litigated damages remedy is that the General Agreement and the Antidumping Code deal exclusively with governmental limitation of or regulation of imports which are sold at dumped prices. GATT does not deal at all with the rights of one private company against another for damages caused by that unfair dumping. That argument disappears, however, under the present legislation. Here the newly-created proceeding results in precisely the type of remedy covered by the GATT -- a governmental (judicial branch) restriction (in the form of injunction) of dumped imports. In my view, the present version of this legislation would, if enacted, would be challenged within GATT, and that challenge would probably be successful.

The present version of this legislation also destroys the "grandfathering" argument which constituted the second line of GATT justification for a remedy in damages. That argument relied upon the fact that the Antidumping Act of 1916 constituted a judicial damages remedy for private litigants which predated both the General Agreement and the Antidumping Code. By changing the primary remedy from damages to injunctive relief, I fear that this legislation has so signficantly changed the thrust of the Antidumping Act of 1916 as

to be interpreted as a new measure which does not pre-date the GATT and the Code.

A. The Legislation Should Not Extend to Subsidies

It is not appropriate that this legislation encompasses foreign subsidies in addition to dumping. The concept of the 1916 Act, and of this legislation, is a litigated remedy for one private party for injury caused by the unfair acts of another private party, the latter being the defendant in the litigation. Where subsidies are concerned, the perpetrator of the unfair act -- subsidization -- is the foreign government, which would not be a party defendant. Moreover, extension of this litigation into that area would constitute a clear intrusion into a particularly sensitive portion of government-to-government relations.

There is, in addition, no credible argument whatsoever that a new remedy against subsidization would be consistent with U.S. obligations under GATT. The "grandfathering" argument arising from the 1916 Antidumping Act clearly does not extend to subsidies. Moreover, for the reasons discussed above, it cannot be contended this is simply a private remedy for damages caused by the unfair act of the foreign exporter. The unfair act -- subsidization -- is done by the foreign government. Therefore, this legislation would be seen as intruding into the very area most clearly covered by GATT -- the international trade practices of governments.

In summary, there is a clear and compelling need for a private, judicial, retrospective remedy in damages for injury caused by a foreign exporter's dumping. However, damages -- not injunction -- should be the primary remedy. Moreover, the issue of subsidies has no legitimate place in this legislation.

Senator SPECTER. Mr. Ehrenhaft, thank you for joining us, and we look forward to your testimony. At the outset, thank you for your prior assistance in the opinions which you have given on the GATT issue.

TESTIMONY OF PETER D. EHRENHAFT

Mr. EHRENHAFT. Thank you, Mr. Chairman. I assume those prior opinions will also be made a part of this hearing record, so that I need not go through them again. I have provided a letter to you that indicates I am still of the opinion there expressed, which is very much along the lines of Mr. Cunningham's statement just made. I believe that a private damage remedy can be squared with the GATT and with the international dumping code. I think, as well, the imposition of new private remedies with regard to Customs fraud would not be inconsistent with the GATT, which attempts to address governmental actions and not private damage actions that are traditional to all legal systems. I think that there would not be a very serious problem with regard to a damage remedy alone.

In that regard, I did want to respond to Senator Hatch's prior question, which was whether there was no present opportunity for recovering damages for dumping, and the existing 1916 Antidumping Act does permit at the present time even the trebling of private damages.

However, we have observed that that statute has been essentially a "dead letter," and I think that this statute you have proposed is a much better one. By having a single damage remedy, I think that it can be both more effective for American industry and consistent with the GATT.

I also, however, share Mr. Cunningham's concern that an injunction remedy is likely to have a more difficult time in being squared with the GATT unless it were subordinated to the damage remedy and were to be available only to the extent that traditional legal remedies are insufficient. It can be that in some unique situations, an injunction could be entered. But I would suggest that the parallel drawn with, for example, contested takeover litigation, is not really appropriate as a guide to the problem that you are trying to deal with here.

I think that you would find that, in civil litigation in which foreign governments have a real interest, that the likelihood of very rapid action and in particular, injunctive action, is going to be extremely difficult to get from our courts no matter what this legislation proposes.

Our firm has been involved in two very massive cases of this kind that illustrate what I am talking about—the uranium cartel case and the *Laaker* litigation with regard to airplane routes across the Atlantic. Those are two cases that have stretched on for years and illustrate that the availability of a private damage or even a treble damage remedy does not necessarily ensure rapid disposition. I think in the takeover situation, you would find a desire on the part of both the company taking over and the target to get a quick decision on whether the farmer is going to be able to proceed or not. Just lends itself to the quick resolution that you point out

in the *Marathon* case, for example. I do not think that when we are talking about restraining imports that you are going to have a similar kind of fact situation.

But at least insofar as you asked me to opine on the squaring of the damage remedy to the GATT, I am happy to say that I believe that by far the better argument supports the kind of approach you make, and I think it is the right direction for adding to our trade laws.

The present trade laws, in the administrative route, have been ineffective for a variety of reasons which we need not rehearse here. I think that what you have proposed will be a useful adjunct, fully consistent with the international obligations of the United States.

Thank you, Senator.

Senator SPECTER. Thank you very much, Mr. Ehrenhaft.

[Prepared statement and excerpts from the Congressional Record follow:]

The Important Trade Issue For 1986

Peter D. Ehrenhaft*/

The current import relief laws do not make much sense. They are the focus of substantial domestic attention and continued international negotiation. They are the grist for countless articles. Their real impact, however, probably is modest. I say "probably" because we lack hard facts from any source -- the U.S. Government, the EC Commission, Japan's MITI, the GATT, the OECD -- concerning the impact on "real world trade" of any of the proceedings initiated. We do not know what happens when relief eventually is granted, what happens if it is denied, or how the market adjusts in either case.

We do know: First, the laws appear to be invoked by only a few industries. The steel, textile, footwear, and chemical producers seem to be the major "users" of the antidumping, countervailing duty and similar provisions. One must ask how effective the laws can be if the same firms within the same industries constantly must return to request the same relief. Either recidivism reigns abroad or the remedy is unsuited to the real ailment, or both.

Second, compared to the total GNP of this country, the trade affected by import relief proceedings is very small. Our GNP is now in the trillion dollar range; our imports are valued in the hundred billions. Aside from steel imports, which might account for $3 to $5 billion annually, the decided trade cases generally involve much smaller stakes. Why, then, do these statutes loom so large? They are an arsenal of howtizers for what is often a rock fight.

Third, the most significant reform of the 1979 legislation, the obligation of the administering authority to conduct annual reviews of outstanding antidumping and countervailing duties, has resulted in revealing glimpses of

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the after-effect of the orders imposing such duties. The published reviews reflect almost no duties being collected. Exporters either have dropped out of the market narrowly defined by the order, or have revised their prices, or renounced their subsidies, to avoid imposition of the duties. In one sense, this reflects the proper working of laws intended to be remedial only. Yet, in another sense, these reviews must mask some important facts, since imports, even of the affected goods, usually continue to grow in both absolute terms and in market share. We must acknowledge that our present laws don't work to preserve U.S. producers' market shares or U.S. workers' jobs.

But the greatest problem with the trade laws is their counterproductive effect. They are rationalized as a way of restoring all participants in the U.S. market to a "level playing field"; it is said the laws are only trying to shield our producers from "unfair" tactics of foreign firms or governments that are taking away U.S. jobs and investments. But can the United States fairly call "unfair" foreign government programs designed to spur development or export performance, or to aid depressed regions or industrial sectors, while counterparts proliferate in our own country? Can the United States fairly ask foreign producers to price their goods to avoid dumping when it applies no similar rule to solely domestic sellers? There is, in fact, no doctrine of "clean hands" recognized in this forum. I suggest all the name calling and charges of unfairness obscure the real issue.

What the trade laws should be addressing, what I hope recent proposals have made a faint start at acknowledging, is the process of facilitating adjustment to change.

Change is the only constant in our personal -- and national -- lives. It can come from political and social developments, creating sources for products and markets previously unknown. No better example exists than the People's Republic of China, which has surged in a decade from a negligible role in the U.S. economy to the major nonmarket-economy supplier and largest customer for at least some U.S.

agricultural exports. It is but one subset of this last phenomenon that changing market conditions for producers and workers can be traced to imports. Our trade laws, however, focus on this wagging tail, and miss the larger dog. Worse, instead of facilitating -- perhaps even mildly coercing -- adjustments in our economy to the new situation, our laws stress relief to help maintain the status quo.

The trade laws should be a part of comprehensive legislation giving aid to industries and workers adversely affected by all sudden changes in the market, whether those changes are traced to a new invention rendering a product obsolete (for example, hand held calculators in one year completely wiping out the industry producing slide rules) or a new source of imports preventing domestic manufacturers from retaining their historic market shares (for example, new basic steel industries in the dozen countries we call "less developed" or "newly industrialized"). Our laws should be lubricants, rather than sand, in the gears of change.

To accomplish these goals, I would urge:

First, adopt and fully fund a program to train workers in new skills and to move to new jobs. Quit throwing good money after obsolete experience.

Second, expand programs to give investors incentives to provide new opportunities for productive work for themselves and others.

Third, reserve government interventions in import trade for the few important cases. These cannot be indentified in advance, but governments "know 'em when they see 'em." In fact they are intervening now, because they <u>fear</u> the actual results of proceedings conducted by the letter of the law.

Fourth, create a private remedy for those aggrieved by "unfair" practices to recovery for themselves recompense from the wrongdoers. The legislation introduced by Senator Specter is a right move in this direction.

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Senate

By Mr. SPECTER (for himself, Mr. BYRD, Mr. HEINZ, Mr. COHEN, Mr. HEFLIN, Mr. KENNEDY, and Mr. LEVIN):

S. 238. A bill to amend the Unfair Competition Act of 1916 and Clayton Act to provide for further relief in the event of unfair foreign competition; to the Committee on the Judiciary.

UNFAIR FOREIGN COMPETITION ACT OF 1985

Mr. SPECTER. Mr. President, I am today introducing the Unfair Foreign Competition Act to put teeth into our existing antidumping laws by granting American industries direct access to Federal courts to promptly halt dumping, to obtain compensation for the injury suffered as a result of the illegal imports, and to deter future illegitimate incursions into U.S. markets.

This legislation will accomplish several essential objectives the current regulatory scheme fails to achieve.

It provides a mechanism for halting illegal dumping within a matter of days, instead of the months or years ITC proceedings and Presidential review can consume; it compensates injured businesses so they can begin to recapture markets illegally taken by foreign imports; it takes ill-gotten profits away from "dumpers" so as to remove their economic incentive for dumping and more effectively deter others from attempting illegal importing; and it rescues struggling industries from the political winds that too often hinder effective, strong-willed government enforcement of fair trade laws.

The beauty of this bill is that it greatly enhances the likelihood that unfair trade will cease without imposing any additional "protective" barriers. It simply makes the existing laws work.

This legislation was originally introduced on March 4, 1982, and hearings were held before the Judiciary Committee. This bill was offered in modified form as an amendment to the gas tax bill in conjunction with the "Buy America" amendment. These two provisions were narrowly tabled by a 51-to-47 vote. This bill was reintroduced in the 98th Congress as S. 418 and additional hearings were held.

This legislation will provide a valuable mechanism for any industry to ensure that free trade is fair trade, but it will be particularly critical for the steel industry.

The evidence is plain that enormous quantities of very heavily subsidized steel are coming into the United States. That fact has been disclosed in a series of proceedings before the International Trade Commission. State-owned firms including nationalized firms in Italy, France, the United Kingdom, and Belgium accounted for at least 62 percent of the European Community steel production in 1983. Over half of the major steel firms in other Western developed countries are state owned. These firms are located in Spain, Austria, Finland, and Yugoslavia. They accounted for 37.6 million net tons or 69 percent of the non-EEC Western country production during 1983.

As a result of this influx in dumping and subsidized steel, Mr. President, almost half of the 457,000 American steelworkers employed in 1975 have since lost their jobs. The situation of the steel industry has gotten worse in recent months. Third-quarter and expected fourth-quarter results for 1984 show significant losses after two break-even quarters following 2 years of huge losses. The credit ratings of three major companies have been downgraded within the last few months below investment grade, which means those companies cannot borrow. All major firms have suffered lower credit ratings since 1981.

The worsening condition of domestic steel results directly from sharp increases in imports. At 15 percent of U.S. sales in 1979, imports rose to 20 percent in 1983, 30 percent for the month of November 1984, and are expected to be at 27 percent for 1984 overall.

Mr. President, these imports are threatening the American steel industry, which is vital to our national welfare. Domestic production is vital because once we find the American steel industry going down the drain and our reliance is solely on imported steel, then we will be at risk of being victimized as we were victimized by OPEC oil exporters. For too long, our trade policies have been dictated by what some may conceive to be in the interest of foreign policy, and American industries one after another, as I see it, have been sacrificed on the alter of foreign policy.

The failure of the current processes to ensure fair trade is nowhere more evident then in the disappointing results of our sincere efforts to negotiate voluntary trade restraint agreements to reduce foreign imports to about 18.5 percent. In July 1984, the International Trade Commission recommended that the President impose a combination of tariffs and quotas on 70 percent of imported steel because of extensive dumping by a number of foreign companies. Unfortunately, the President did not accept these recommendations. Instead, he instructed the U.S. Trade Representative, Ambassador Brock, to negotiate voluntary restraint agreements with a number of foreign governments.

On December 17, 1984, I learned that the Republic of Korea was not cooperating with Mr. Brock in concluding a voluntary restraint agreement. I, therefore, wrote a letter to Ambassador Lew urging Korea to reach accommodation on this important issue.

On December 18, 1984, Mr. Brock announced the conclusion of the steel negotiations with seven countries which included Korea. These agreements, however, failed to reduce imports to 18.5 percent and also lacked import details of category breakdown of products for both Japan and Korea.

In view of Mr. Brock's trip in mid-January to Korea and Japan to work out the details of categories, I wrote the Ambassadors of both Japan and Korea on January 4, 1985, urging

them to reach agreement with Mr. Brock on this important issue. I also noted in my letter that legislation was introduced, of which I was an original cosponsor, legislating 39 categories with specific totals for both Japan and Korea.

I am hopeful that these details will be worked out, but even if agreement is reached, the voluntary restraint agreements do not go far enough. I wrote to Mr. Brock, again, at the end of December, alerting him of my concern that Canada, the second largest exporter, has not been required to enter into a voluntary restraint agreement. Moreover, nations such as Sweden, Austria, Venezuela, Taiwan, and several Eastern European countries must enter into agreements. Otherwise, the President's global program of import reduction will be ineffective.

Furthermore, I believe that countries such as the People's Republic of China and India must be monitored closely due to the growth of large ultramodern government-subsidized steel plants. I have inspected truly impressive mills with massive unloading, construction, and storage facilities in Taiwan and the PRC. These countries have, or will have, the potential to flood the U.S. market with cheap subsidized steel if they remain unchecked.

This is why I am reintroducing this bill.

Ambassador Brock has been an effective negotiator on the United States' behalf, having successfully concluded several voluntary restraint agreements as of this date. The entire process of investigation, administrative litigation, and negotiation, however, has confirmed the existence of a fundamental flaw in our system for combating dumping. This flaw is the almost total lack of a deterrent element.

Section 101 would supply the necessary deterrent in two ways. First, by making injunctive relief available to injured U.S. companies, the UFCA would place foreign "dumpers" on notice that any investment in dumping in the United States could be lost instantaneously, since U.S. courts would be empowered to prohibit further sales in appropriate circumstances.

Under this bill, an injured domestic business could, immediately upon learning of the illegal dumping, go to the U.S. District Court in the District of Columbia and ask for a "temporary restraining order" (TRO) to immediately halt the imports and sales.

Thus, illegal dumping could be halted within days of its discovery, rather than the months or years it takes in the administrative maize. The temporary restraining order can then be modified to provide a more permanent halt after a more detailed finding.

It is a realistic approach to have injunctive relief granted to stop such subsidies and such dumping. The case of Marathon against Mobil Oil is illustrative of the point. That complex litigation was decided in the course of 6 weeks in the U.S. District Court in Cleveland. I have had substantial experience in civil litigation and can personally attest that when one of these cases is brought and the facts can be ascertained—for which purpose discovery is available—motions can be made for a temporary restraining order or preliminary injunction and can be granted in a manner of a few weeks at most. Once an injunction is granted, that would stop the importation of subsidized or dumped steel. If someone wants to take an appeal, he or she can do so, but the injunction stays unless [illegible] an effective remedy.

Unlike the proceedings before the International Trade Commission, which takes months and years and induce a surge of steel, this injunctive relief would be highly effective.

Second, by making damages available to U.S. companies if dumping and injury are ultimately found to have occurred, the UFCA will remove the illegally obtained profits and increase the cost of dumping. Foreign enterprises would be made aware that, like any domestic company, they will be held responsible for the economic consequences of their anticompetitive actions.

They would be forced to figure this potential cost into their calculations, and would be much more likely to conclude it is not an economically sound decision to attempt illegal dumping in the United States.

In contrast, the current regulatory scheme rarely imposes retroactive duties and, instead, merely restricts future dumping. The illegal dumper walks away with all the profits made through this unfair competition over the months or years it took to halt their action. Is it any wonder they immediately begin to plan their next incursion into American markets?

It is my view that as a matter of urgent necessity, the Congress should act to provide that imported steel should not come into this country where the evidence shows it is dumped or subsidized and there ought to be a remedy by having jurisdiction conferred on the U.S. District Court for the District of Columbia to consider such evidence and to order the injunctive relief. It has long been the law of the United States, Mr. President, that subsidized goods and dumping are illegal but there is no effective remedy presently on the books.

Where the laws of the United States prohibit dumping and prohibit subsidy, those laws ought to be enforced. The way to get enforcement is through the courts. Minority groups have achieved justice in the courts—blacks, women, Hispanics. If American industry is to receive justice, it is going to be in the courts as well.

When individuals oppose the restriction of imports on the grounds of free trade, they overlook a very fundamental fact that a great deal of the imports, steel, cement, copper, and many other products are being brought into the United States as a result of subsidies or as a result of dumping. Free trade means fair trade and fair trade is the absence of subsidy and dumping. It is a misnomer to say that we are enforcing a policy of free trade when we permit this very heavy subsidization and dumping to take place in the United States.

Mr. President, an issue has been raised in former discussions on this matter as to whether this legislation violates GATT. There is an opinion of counsel by Peter D. Ehrenhaft, submitted to me on August 24, 1982, and I ask unanimous consent that the full text of his opinion be printed in the RECORD, together with the full text of the prior letter which he had written to Senator Ribicoff, dated March 13, 1980, establishing the legality of such a remedy under GATT.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HUGHES HUBBARD AND REED,
Washington, DC, August 24, 1982.

Re S. 2167.

Hon. ARLEN SPECTER,
U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter inviting me to provide you with an opinion concerning the consistency of S. 2167 with the GATT and the Antidumping Code. I am sorry I have been unable to respond earlier, but I have been out of my office for a number of weeks since I spoke with Mr. Finkel.

My views on this subject remain consistent with those expressed in the enclosed copy of a letter submitted to Senator Ribicoff when the latter chaired the Trade Subcommittee of the Senate Finance Committee during the last Congress.[1] It is, in brief, my opinion that:

1. The GATT and Code do not preempt a private remedy.

A "single damage" statute, such as the one you are now proposing, cannot be "preempted by," nor be regarded as violative of, either the GATT or the Antidumping Code. On the issue of dumping, the GATT refers solely to the actions of governments imposing "antidumping duties." The Code provides procedures and certain substantive rules for the invocation of this governmental action. But neither the GATT nor the Code deals with private remedies, pursued in ordinary law courts, seeking redress for past injuries caused by other private parties through behavior that may also be "dumping" at which duties may be aimed in the future. This judgment is, by the way, echoed in a recent article by Senator Danforth's former Trade Counsel, Kermit Almstedt. See, "International Price Discrimination and the 1916 Antidumping Act—Are Amendments in Order," 13 Law & Pol. Int. Bus. 747, 779 (1931). (I am also enclosing the last four pages of that article in which this issue is discussed.)[2]

2. Article 16 of the Code is irrelevant.

The Administration has recently pointed specifically to Article 16, § 1 of the Antidumping Code as precluding a measure such

[1] The letter was made part of the Subcommittee's Hearing (at page 371 on "Possible Amendments to the 1916 Antidumping Act" held on March 11, 1980, the printed version of which is undoubtedly available to you.

[2] It is also of interest that at the 1980 Hearings a memorandum was submitted by three experienced trade lawyers, including Gary N. Horlick, now the Deputy Assistant Secretary for Import Administration at the Commerce Department and thus, the official now most directly responsible for the administration of the antidumping laws and representing the United States in the GATT with respect to such matters. It concluded that it "seems uncontroversible" that no amendments to the Antidumping Act of 1916 similar to those in S. 2167 "would in any way be circumscribed by the trade agreements obligations of the United States." Hearings, supra, at 23.

as S. 2167. That section provides:

"No specific action against dumping of exports from another party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement."

However, this section does not bar private damage actions. Its purpose is to prevent other governmental action against dumped imports—such as cease and desist orders—and to assure that investigations and actions are taken with the requisite "transparency" and "due process." See, e.g., S. Rep. 96-249, 96th Cong., 1st Sess. 41 (1979).

The mere enactment of a law creating (or amending) a possible private damage remedy is surely not a "specific action against dumping of exports" within the meaning of Article 16 of the Code. Thus, the passage of a bill such as S. 2167 is not covered by this provision. And the implementation of a measure such as would be authorized by S. 2167 should also not be seen as a "specific action against the dumping of exports"; it is only the invocation of a traditional legal remedy by one "person" for economic harm knowingly done by another. As already noted, the addressees of the cited provision—as all other provisions in the GATT—are governments and not private parties.

5. Damages are not "duties."

The Administration has reiterated suggestions that the GATT and Code permit the imposition of antidumping duties only after governmental findings of dumping margins and material injury to a domestic industry caused thereby.[1] These observations are accurate—but beside the point. The compensation to be collected by a damaged domestic producer from a foreign seller (or its U.S. importer) under the proposed statute would not involve the imposition of an "antidumping duty" as that term has been historically understood or is commonly used today. The term has a precise meaning. It means a certain type of customs duty collected on the importation of merchandise from its importer and then deposited in a government treasury. It does not include the type of damages collectible by private parties that S. 2167 would authorize.

In that connection, I might add that it is undeniable that S. 2167 or a similar law may constitute an additional "non-tariff barrier" (NTB) to imports. And it is also true that it was one of the aims of the Multilateral Trade Negotiations (MTN) out of which the current antidumping Code emerged, to reduce NTB's. But many existing or imaginable NTB's were unaffected by what occurred in the MTN, including most notably the rules concerning "safeguards" (in our parlance "escape clause" actions). The subject of private remedies to counter "unfair trade practices" was simply not discussed and no agreement concerning their use was even tabled for consideration.

6. The 1916 Act is "grandfathered" under the Protocol.

Even if the 1916 Act were in some way inconsistent with the GATT and Code, these international agreements apply only to the extent they are not "inconsistent with existing legislation" under the Protocol of Provisional Application by which the United States adhered to the General Agreement. The 1916 Act antedates both the GATT and Code by many years. The amendments now proposed—particularly to the extent they eliminate the risks of treble damages or criminal penalties—cannot be regarded as new law not embraced by the Protocol. They are a continuation of that statute.

In the Trade Act of 1974 Congress extended the countervailing duty law to products not otherwise subject to ordinary customs duties. In that context, Congress felt that the GATT obligated the United States to apply an "injury test" to such imports before applying CVD's. The Protocol did not shield that new, substantive—and more onerous—obligation on foreign exporters. See S. Rep. 93-1298, 93d Cong. 2d Sess. 185 (1974); S. Rep. 96-249, 96th Cong., 1st Sess. 39 (1979). However, that is not an apt analogy to the present situation. While the amendments proposed in S. 2167 are intended to revive what is universally regarded as a "dead letter" of our law through certain procedural (e.g., allowing use of administrative determinations as prima facie evidence in court proceedings), the substantive aspects of the law should be less onerous to companies in the countries that are our trading partners. Such a relaxation of existing law (from the foreigners' vantage point) should, therefore, still be shielded from claims of GATT inconsistency by the Protocol.

I hope that the foregoing is useful. At the same time, permit me both to thank you for this additional opportunity to present my views and to express my satisfaction that your amended bill has taken account of many of the points I made when I testified on May 24. To that I might just add for your information that a new complaint under the existing 1916 Act has recently been filed in the U.S. District Court in Denver by *CF&I Steel Corp.* of Pueblo, claiming Mitsui & Co. sold a variety of imported steel products in violation of the Act. *CF&I Steel Corp.* v. *Mitsui & Co. (USA), Inc.*, Civ. Action No. 82-Z-1288 (D. Col. 1982). However, expeditious action seems unlikely. See, for example, the ongoing case of *Outboard Marine Corp.* v. *Pezetl*, in which the most recent opinion of the District Court, permitting the plaintiff to amend its complaint was recently published. 3 ITRD 1917 (D. Del. 1981). The case was also initially brought, *inter alia*, under the 1916 Act but is now being prosecuted solely as a straight antitrust suit claiming predatory pricing. The original complaint was filed in February 1977; the recent amendment was allowed more than five years later, still well before trial and before the defendants have been permitted even to initiate discovery on their antitrust counterclaims. I think the case illustrates why I do not think your bill, although a useful addition to our trade laws, will provide the speedy action your statements at the hearing in May indicated you were seeking.

Sincerely,

PETER D. EHRENHAFT.

Enclosures.

HUGHES HUBBARD & REED,
Washington, DC, March 13, 1980.

Re Amendments to the Antidumping Act of 1916.

Hon. ABRAHAM A. RIBICOFF,
Chairman, Subcommittee on International Trade, Committee on Finance, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I appreciated the opportunity to appear before your Subcommittee on March 11 and share with you and your colleagues some of the impressions gained from my experience in the administration of the Antidumping Act of 1921 while serving as the Deputy Assistant Secretary and Special Counsel for Tariff Affairs at the Treasury through the end of 1979. One issue that was raised at the hearing, however, that I did not have time to address concerned your question about the compatibility of a statute authorizing a private cause of action to recover damages caused by dumping with the newly negotiated Code on Antidumping Measures to which the United States has now adhered. It is a very good question. I cannot provide you with a legal opinion as a reply. But I can indicate my views, based on more than 23 years of study and experience with antidumping laws and my particular recent responsibility both in connection with the negotiation of the Antidumping Code in the MTN and heading the U.S. delegation to the 1977 through 1979 meetings of the GATT Antidumping Committee.

In my judgment, a statute, permitting the recovery of compensatory—particularly "single," as opposed to "treble"—damages for injury caused by tortious business behavior could not be regarded as a breach of the Antidumping Code.

First, the Antidumping Code is an agreement on the "Implementation of Article VI of the GATT." Article VI of the GATT does not prescribe the only method for dealing with the problem of dumping. Section 1 defines the concept of dumping—injurious price discrimination between national markets—and Section 2 states that:

"In order to offset or prevent dumping a contracting party may levy an antidumping duty not greater in amount than the margin of dumping. . . ."

The GATT, itself, thus does not suggest, much less state expressly, that antidumping duties are the exclusive method by which the problem of dumping may be addressed. It simply indicates that if the problem is attacked through the imposition of an "antidumping duty," that duty may not exceed the margin of dumping.

Second, the Code, itself, is concerned only with the implementation of the cited Article of the GATT. That is clear from Article 1 of the Code, taken almost verbatim from the 1967 Code. The Code speaks about the "imposition of an antidumping duty . . . to be taken only under the circumstances provided for . . . and pursuant to . . . this Code." (Emphasis added.) Thus, the Code also does not affect other actions that are not in the nature of "duties," that may affect goods that are "dumped."

Third, both when the 1967 Code was negotiated and throughout the MTN, our trading partners (not to speak of the U.S. negotiators) knew about the existence of the U.S. 1916 Antidumping Act providing criminal penalties and treble damages for acts that are comparable to those at which antidumping "duties" are aimed. Nevertheless, as far as I know, no claim was ever made by any foreign government or any U.S. agency that the existing 1916 law contravenes the Code. It may be argued that the existing law, with its requirement for "intentional injury" defines offensive behavior different in kind from that addressed by the GATT or the Code. However, that argument supports the view that the Code does not exhaust all possible remedies that a government may adopt to combat or remedy practices analogous to the "strict liability" dumping defined by the Code (i.e., "dumping" without any "intent to injure" element).

A statute that provides compensatory damages recoverable through a private action in a court of law for market behavior that has unjustifiably caused injury should not be read to be—and, in my view, is not—inconsistent with the Code. It supplements the Code-envisaged remedy. Even retention of treble damages and criminal penalties for intentional injurious behavior should not be regarded as Code inconsistent. However, as a number of witnesses at the hearing indicated, the existing antitrust laws would seem adequate to cope with intentionally harmful pricing and no further civil remedy is needed to deal with it.

A slightly more troublesome issue was raised by some witnesses concerning the possible incompatibility of a statute permitting a cause of action affecting only imported goods with the "national treatment" provisions of Article III of the GATT. However, we presently have domestic laws—primarily

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[1] See, e.g., letter of USTR General Counsel Robert Cassidy to Senator Ribicoff in the Hearings, supra, at 145, and the similar views of the present incumbent, Donald Ike Kieffer, submitted to your committee.

the Robinson-Patman Act—that contemplate remedies against sellers who discriminate between markets to the detriment of the seller's competitors. (Representatives of the American Importers Association discussed at the hearing the wholly separate—and admittedly inapplicable—remedy of the Robinson-Patman Act available to competitors of a favored customer.) The creation of a remedy addressed to imported goods causing injury to competition at the seller's level should not breach Article III to the extent that it parallels comparable domestic law. Mere extension of the Robinson-Patman Act to international trade would be one way to achieve that result. But it may not be the best method, in part because it may be desirable for some of the reasons indicated in my oral testimony to vest trial jurisdiction over the international remedy in the Customs Court that will otherwise be interpreting the language of the antidumping laws.

In any event, before any action is taken to create a new cause of action, I would urge the Subcommittee to commission some further, serious factual studies of the existence of "dumping" as a real phenomenon in U.S. trade and the extent to which our existing laws have affected both trade in particular and the economy of the Nation in general. I believe such a study would support my impression that a private remedy of the type being proposed might make good sense for many of the smaller cases that make up the bulk of the work of the "Administering Authority," while the law is not well suited to cope realistically with the big cases. For those problems—steel, textiles, automobiles—alternative, more macro-economic responses are required outside either the private suits contemplated by the bill you are considering or the procedures now authorized by the Trade Agreements Act.

Respectfully submitted.

PETER D. EHRENHAFT.

INTERNATIONAL ANTIDUMPING AGREEMENTS

One final question must be addressed. Would amending the 1916 Antidumping Act as proposed herein violate any of the international obligations of the United States assumed as a signatory to the General Agreement on Tariffs and Trade (GATT),[***] or the International Antidumping Code of 1979,[***] formulated during the Tokyo Round of the Multilateral Trade Negotiations?[***]

Article VI of the GATT and the International Antidumping Code of 1979 do not by their own terms prohibit national legislation, such as the 1916 Antidumping Act, from providing remedial relief against dumping.[***] When the GATT and the antidumping code were negotiated, one may rightfully argue that the United States' trading partners knew of the existence of U.S. legislation that provided for judicial remedial relief in the form of treble damages upon a finding of international price discrimination. Nevertheless, no claim was or has ever been made that any of the provisions of the 1916 Antidumping Act contravened either the GATT or the antidumping code.[***] Even assuming arguendo that remedial relief statutes such as the 1916 Act would be incompatible with article VI of the GATT, the United States is not necessarily bound by that article due to a provision exempting countries with conflicting preexisting legislation from compliance.[***]

The International Antidumping Code of 1979 sought to establish uniformity among signatories in implementing the GATT antidumping provisions.[***] The Code is thus merely an agreement among signatories for the implementation of article VI of the GATT. Neither the GATT nor the Code mandates or even suggests that imposition of dumping duties is the exclusive form of relief sanctioned against dumping.[***] Section 2 of article VI of the GATT merely provides that if a signatory wishes to attach an antidumping practice by levying a antidumping duty then the duty cannot exceed the margin of dumping.[***] Finally, since the amended 1916 Act would provide relief when there is injury to an industry as defined in the Antidumping Act of 1921, as amended, and the 1921 Act was amended to conform to the 1979 Code,[***] the terms of the amended 1916 Act would comply with the implementing Code.

One other argument which may be raised is the notion that amendments to the 1916 Act may contravene the "national treatment" article of the GATT.[***] Article III provides that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin . . ." Neither the 1916 Antidumping Act nor the amendments proposed herein favor domestically produced articles over imported articles, since the former are subject to a comparable price discrimination law, the Robinson-Patman Act.[***] In conclusion, neither the 1916 Antidumping Act nor the amendments proposed here are contrary to the obligations undertaken by the United States as a signatory to the GATT.

CONCLUSION

The 1916 Antidumping Act has not proved to be an effective means of redress for private parties injured by the pricing practices of U.S. importers of foreign manufacturers. Because the Antidumping Act of 1921 provides only prospective relief after a complex administrative determination, the ability of a U.S. industry to obtain treble damages for harm actually inflicted by dumping practices would further the policy of prohibiting international price discrimination much in the same manner as the ability of antitrust plaintiffs to obtain treble damages furthers the policies underlying the Sherman Act. The question that ultimately must be addressed is whether Congress is sufficiently committed to the policy of preventing harm to U.S. industries from the deleterious pricing practices of foreign manufacturers that it will coordinate the antidumping legislation to best achieve its underlying policies.

Mr. BYRD. Mr. President, Senator SPECTER's legislation, amending the Clayton Act (15 U.S.C. 12), provides American industries injured by unfair foreign competition with an avenue of redress through the Federal courts. I was an original cosponsor of this measure when it was first introduced in the 97th Congress, and I was pleased to be an original cosponsor of S. 418, as this measure was designated in the 98th Congress.

The purpose of this bill is to provide an effective remedy when an American industry is injured by goods dumped into our market or subsidized by foreign interests. This measure is of particular importance to America's steel industry. While the administration has managed to obtain commitments from several important steel-exporting countries which will limit their share of the American market, we cannot be certain that the administration's program will answer the challenge to the steel industry posed by other unfair foreign competition. Senator SPECTER's bill will complement existing trade laws and assure that industries such as steel will be able to respond appropriately if foreign producers continue to flood the American market with products priced below market rates.

I commend Senator SPECTER for his commitment in bringing this matter before the Senate once again, and I am pleased to appear as an original cosponsor of this bill.

[***] General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (hereinafter cited as GATT). Article VI of GATT applies specifically to antidumping legislation.

[***] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done Apr. 9, 1979, MTN/NTM/W/232 (hereinafter cited as International Antidumping Code of 1979), reprinted in Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations, H.R. Doc. No. 153, 96th Cong., 1st Sess., pt. 1, at 211 (1979) (hereinafter cited as MTA).

[***] In the sixty-six years since the passage of the 1916 Antidumping Act, dumping has often been the subject of international discussion. As early as 1927, the World Economic Conference in Geneva passed a resolution recognizing the harmful influence dumping may have on a domestic economy. See Marks, supra note 10, at 566. By the 1930s, at least twenty-five countries had adopted some kind of antidumping law. Id. In 1947, GATT was adopted. GATT condemns dumping if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. GATT, supra note 198, art. VI, para. 1. During the Kennedy Round of the Multilateral Trade Negotiations, GATT members adopted a Dumping Code designed to encourage uniform dumping laws. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431. The 1967 Code provided guidance in the interpretation of the concepts of "evaluation," "injury," and "industry." See Technical Analysis, supra note 12, at 1411-14. The U.S. Congress specifically declined to implement the 1967 Code because of constitutional questions and the reluctance to amend the Antidumping Act of 1921. See id. at 1416-18. Pursuant to the Tokyo Round of Multilateral Trade Negotiations, the International Dumping Code of 1979, supra note 180, was adopted. In order to harmonize the world antidumping laws, the Code provides uniform definitions of "industry," "injury," and "evaluation." Id. arts. 4, 5 reprinted in MTA at 214-18, as well as procedural changes to make the resolution of dumping disputes more equitable. See Technical Analysis, supra note 12, at 1418-19. The Trade Agreements Act of 1979, supra note 12, repealed the Antidumping Act, 1921, and replaced it with provisions designed to be consistent with the International Antidumping Code of 1979. See note 12 supra. While the expressed intention of Congress was to enact legislation consistent with obligations contained in the Code, this intention was qualified by the language "as the United States understands those obligations." S. Rep. No. 249, 96th Cong., 1st Sess. 15-16, 36 (1979). Congress' legislative response to the 1968 and 1979 Codes demonstrates that although Congress is aware of its international obligations, it does not view its own power as necessarily limited by those agreements.

[***] See generally GATT, supra note 198, art. VI; International Antidumping Code of 1979, note 199 supra.

[***] S. 223 Hearings, supra note 171, at 30 (letter from Peter D. Ehrenhaft to Sen. Ribicoff, Chairman, Subcomm. on Int'l Trade of the Comm. on Finance).

[***] Protocol of Provisional Application of the General Agreement on Tariffs and Trade, signed Oct. 30, 1947, 61 Stat. A3051, T.I.A.S. No. 1700, 55 U.N.T.S. 308. Paragraph (1)(b) of the protocol requires the adoption of part II of the GATT, which includes article VI, "to the fullest extent not inconsistent with existing legislation." Id.

[***] See note 200 supra.

[***] See S. 223 Hearings, supra note 171, at 32-33 (memorandum submitted by Messrs. Peter Buck Feller, Charles Vernon Jr., and Gary Horlick).

[***] GATT, supra note 198, art. VI, para. 2.

[***] See S. Rep. No. 249, 96th Cong., 1st Sess. 15-16 (1979).

[***] GATT, supra note 198, art. III(4).

[***] Robinson-Patman Act, 15 U.S.C. 13, 13a (1976).

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Senate

S. 1655—UNFAIR FOREIGN COMPETITION ACT OF 1985

Mr. SPECTER. Mr. President, I am today introducing legislation to expand even further the ambit of S. 236, the Unfair Foreign Competition Act of 1985. When Senators HEINZ, BYRD, KENNEDY, and others joined me in introducing S. 236 earlier this session, we sought to give American industries direct access to Federal courts to promptly halt the injurious import of dumped and subsidized products, and to deter future dumping and subsidy.

The present bill makes several improvements upon S. 236 to accommodate concerns which have been voiced about venue, standing, and preferred remedies. More significantly, the bill would now extend the central component of S. 236's approach—a private right of action and the availability of swift injunctive relief—to include not only dumping and subsidy but to Customs fraud as well.

Mr. President, this is that rarity among trade bills: A bill which is cosponsored by both Majority Leader DOLE and Minority Leader BYRD, and toward which the President is favorably disposed. Although no final commitment was given to me, I had an opportunity to discuss this bill with the President on July 31, 1985.

When I discussed this bill with President Reagan, he was very interested in it as a nonprotectionist means of responding to our trade crisis.

When advised that this bill did not enact any new limitations on imports but sought only to give an effective means of enforcing existing remedies, the President expressed the tentative opinion that it sounded like an appropriate measure.

Given the President's favorable attitude toward vigorous enforcement of existing trade laws—which is the very heart of my bill—I think it is safe to say that this bill—if, as, and when enacted—would not face the Presidential veto that the President has virtually promised to exercise in the event Congress passes a protectionist bill. That is the beauty and the practicality of this bill: tangible, significant, and effective relief for the hardest hit American industries, by virtue of vigorous private enforcement in Federal court, to not resort to protectionism.

The evidence is plain that enormous quantities of dumped and subsidized products, and goods which violate the Customs laws, are entering this country every year. Equally clear is that the current laws prohibiting such imports are—for various reasons—not being effectively enforced.

Illegal dumping, subsidy, and Customs fraud have cost hundreds of thousands of Americans their jobs in recent years. Yet present laws prohibiting dumping, subsidy, and Customs fraud have been little if any help to the critically injured American industries. Proceedings brought before the International Trade Commission typically consume months or even years, by which time dumpers have captured new markets and gathered huge illgotten profits. Indeed, even when the ITC last year recommended that new tariffs and quotas be imposed on foreign steel because of clear evidence of widespread dumping, the President rejected the recommendation in favor of voluntary restraints.

By the Government's own admission, Customs fraud is rampant with regard to textiles, apparel, computer software, hand tools, sugar, electronics, automotive products, chemicals, petrochemicals, agricultural products, pharmaceutical products, and other industries. Illegal dumping is severely injuring American steel, chemical, glass, textile, electronics, agriculture, rubber and cement industries, among others. Foreign subsidies injure American manufacturers of footwear, steel, textiles, apparel, glass, wool, leather, tires, cement, sugar, iron, railway cars, and other products.

When interested Members of the U.S. Senate and the House of Representatives take a look at this list of egregious violations of law currently unremedied, it is my thought that there will be an overwhelming majority in both Houses that will come forth and support this kind of reasonable

targeted, and directed remedy.

The bill I introduce today would in no way interfere with the administration's pursuit of voluntary import restraints. It would offer no new tariffs or quotas or protectionist barriers. It would not displace any existing remedies through the ITC or otherwise. Rather, it would reduce the pressures for resort to such disfavored measures, by allowing vigorous enforcement of laws already on the books.

Mr. President, there is nothing like the vigor of private plaintiffs when it comes to enforcement of trade laws or other means of self-help which have long been demonstrated to be the most effective way to get enforcement and action by those who are most directly affected and injured. We have many decades of evidence of this with regard to enforcement of our antitrust laws. The theory that private plaintiffs would find strong incentive to bring such antitrust suits—and in so doing would both recoup deserved compensation for their injuries and advance strong national public policy interests—certainly has proved correct. There is no reason that the same would not be true of private suits to enforce our international trade laws.

The reality is that many interest groups have received appropriate enforcement and justice when resort could be made to the courts. It is vital to take the enforcement of such trade laws out of the realm of politics, be it the political considerations which engulf the executive or legislative branches—as, for example, the President's overruling of the findings of the ITC. Blacks and women have received justice when they could take their cases to the courts. So, too, will American industry receive justice when laws can be enforced through the judicial process and there is not a situation where American industry is sacrificed on the altar of foreign policy.

As noted, the bill broadens the approach of S. 236 in an extremely important way, by providing for private suits to enforce not only the existing dumping and subsidy laws but the Customs laws as well. Violations of the Customs law are flagrant, widespread, and extremely debilitating to some of our most basic domestic industries: textiles, apparel, footwear, and many others.

Customs violations are rampant in several pernicious forms. Massive country of origin fraud occurs, whereby a country which has reached its permissible quota for a given item or product circumvents the quota by transshipping the continued imports through another country which has not yet reached its quota. Most commonly—indeed, in hundreds of thousands of cases—imports are fraudulently misiabelled. Given the sheer volume of imports and the limited resources of the Customs Service, many imported textiles, apparel and footwear simply are declared to be something which they are not, or are immensely underdisclosed in number—again, in order to evade quotas fixed by the administration.

Domestic textile, apparel and footwear manufacturers and their employees pay a very heavy toll for these illegal imports. Beyond the individual injury, our national goals and policies are thwarted. In my State alone, more than 15,000 textile jobs were lost in the last year.

Mr. President, we should not be surprised by recent protectionist calls for new tariffs against goods from countries with large trade surpluses with the United States. I sympathize with the frustrations which lead to such efforts, even as I question their appropriateness. The way to avert such counterproductive measures is to enforce the trade laws which already are in place. This bill will greatly increase the enforcement of those laws, by letting injured American businesses go directly to Federal court—just as they can for violations of the antitrust laws—and seek quick injunctions against continued illegal importation.

The legal process is well attuned to this kind of an effective remedy. The case of Marathon versus Mobil Oil is an illustration of a case which involved a complex, factual legal situation which was decided by the U.S. district court in Cleveland in the course of some 6 weeks. It is important to emphasize that once such injunctions are issued they stay in effect and no goods can be shipped in violation of those prohibitions while any appeal is pending. That is so because the order of the district court remains in effect unless and until a supersedeas is ordered, which is not a practical reality given the requirement of posting a bond and the substantial sums of money involved in these matters. Similarly, the Federal discovery procedures lend an excellent avenue for injured U.S. interests to seek discovery from any importer who wants to utilize our markets. If importers wish to do business in the United States, they ought to be subject to the jurisdiction of our courts for equitable relief. They ought to be subject to telling specifically what has happened in terms of subsidies or dumping or [illegible] circuity and violations of the Customs laws which are applicable in so many situations.

This is an effective remedy because

it does not address the problem after the fact. It stops goods from coming into this country before they can displace American products and American jobs.

We desperately need the vigorous private enforcement this bill would spur if we are to successfully chart a course between the grave dangers of increased protectionism and the certain peril which would result from unabated illegal foreign imports. Accordingly, I urge my colleagues to join Senator DOLE, Senator BYRD, and others in supporting this bill.

I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1655

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Unfair Foreign Competition Act of 1985".

SEC. 2. Section 1 of the Clayton Act (15 U.S.C. 12) is amended by inserting after the words "nineteen hundred and thirteen;" the words "section 801 of the Act of September 8, 1916, entitled 'An Act to raise revenue, and for other purposes' (39 Stat. 798; 15 U.S.C. 72);".

SEC. 3. (a) Section 801 of the Act of September 8, 1916 (39 Stat. 798; 15 U.S.C. 72) is amended to read as follows:

"SEC. 801.

"(A) No person shall import or sell within the United States any article manufactured or produced in a foreign country if:

"(1) such article is imported or sold within the United States at a United States price which is less than the foreign market value or constructed value of such article; and

(2) such importation or sale—

"(i) causes or threatens material injury to industry or labor in the United States, or

"(ii) prevents, in whole or in part, the establishment or modernization of any industry in the United States.

"(B) any interested party who shall be injured in his business or property by reason of an importation or sale in violation of this section, may bring a civil action in the district court of the District of Columbia or in the Court of International Trade against any manufacturer or exporter of such article or any importer of such article into the United States who is related to such manufacturer or exporter.

"(C) In any action brought under subsection (B), upon a finding of liability on the part of the defendant, the plaintiff shall—

"(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into, or sale or distribution within, the United States by such defendant of the articles in question; or

"(2) if such injunctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained; and

"(3) recover the costs of the action, including reasonable attorney's fees.

"(D) The standard of proof in any action filed under this section is a preponderance of the evidence. Upon a prima facie showing of the elements set forth in subsection (A), or upon a final determination adverse to the defendant by the Department of Commerce or the International Trade Commission under section 735 of the Tariff Act of 1930 (19 U.S.C. 1673d) relating to imports of the article in question for the country in which the manufacturer of the article is located, which final determination shall be considered a prima facie case for purposes of this Act, the burden of rebutting such prima facie case thus made shall be upon the defendant.

"(E) Whenever it shall appear to the court that justice requires that other parties be brought before the court, the court may cause them to be summoned, without regard to where they reside, and the subpoenas to that end may be served and enforced in any district of the United States.

"(F) The acceptance by any foreign manufacturer, producer or exporter of any right or privilege conferred upon him to sell his products or have his products sold by another party in the United States shall be deemed equivalent to an appointment by the foreign manufacturer, producer, or exporter of the District Director of the United States Customs Service of the Department of the Treasury for the port through which the article is commonly imported to be the true and lawful agent upon whom may be served all lawful process in any action brought under this section.

"(G)(1) An action may be brought under this section only if such action is commenced within four years after the date on which the cause of action accrued.

"(2) The running of the statute of limitations provided in paragraph (1) shall be suspended while any administrative proceedings under section 731, 732, 733, 734, or 735 of the Tariff Act of 1930 (19 U.S.C. 1673-1673d) relating to the importation in question, or any appeal of a final determination in such proceeding, is pending and for one year thereafter.

"(H) If a defendant in any action brought under subsection (B) fails to comply with any discovery order or other order or decree of the court, the court may—

"(1) enjoin the further importation into, or the sale or distribution within, the United States by such defendant of articles which are the some as, or similar to, those articles which are alleged in such action to have been sold or imported under the conditions described in subsection (B) until such time as the defendant complies with such order or decree, or

"(2) take any other action authorized by law or by the Federal Rules of Civil Procedure, including entering judgment for the plaintiff.

"(I)(1) Except as provided in paragraph (2), the confidential or privileged status accorded by law to any documents, evidence, comments, or information shall be preserved in any action under this section.

"(2) The court in any action brought under this section may—

"(A) examine, in camera, any confidential or privileged material,

"(B) accept depositions, documents, affidavits, or other evidence under seal, and

"(C) dispose such material under such terms and conditions as the court may order.

"(J) Any action brought under this section shall be advanced on the docket and expedited in every way possible.

"(K) For purposes of this section—

"(1) The terms 'United States price', 'foreign market value', 'constructed value', 'subsidy', and 'material injury', shall have the respective meaning given such terms by title VII of the Tariff Act of 1930.

"(2) If—

"(A) a subsidy is provided to the manufacturer, producer, or exporter of any article, and

"(B) such subsidy is not included in the foreign market value or constructed value of such article (but for this paragraph),

the foreign market value of such article or the constructed value of such article shall be increased by the amount of such subsidy.

"(L) The court shall permit the United States to intervene in any action, suit or proceeding under this section, as a matter of right. The United States shall have all the rights of a party.

"(M) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702).".

SEC. 4. It is the sense of the Congress that the provisions of this section are consistent with, and in accord with, the General Agreement on Tariffs and Trade (GATT).

SEC. 5. Chapter 95 of Title 28 of the United States Code is amended by adding at the end thereof the following new section:

"§ 1586. Private Enforcement Action

"(a) Any interested party who shall be injured in his business or property by a fraudulent, grossly negligent, or negligent violation of section 592(a) of the Tariff Act of 1930 (19 U.S.C. 1592) may bring a civil action in the district court of the District of Columbia or in the Court of International Trade, without respect to the amount in controversy.

"(b) Upon proof by an interested party that he has been damaged by a fraudulent, grossly negligent, or negligent violation of section 592(a) of the Tariff Act of 1930, such interested party shall—

"(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into the United States of the articles or products in question; or

"(2) if such injuctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained; and

"(3) recover the costs of suit, including reasonable attorney's fees.

"(c) For purposes of this section—

"(1) The term 'interested party' means—

"(A) a manufacturer, producer, or wholesaler in the United States of a like or competing product, or

"(B) a trade or business association a majority of whose members manufacture, produce, or wholsale a like product or a competing product in the United States;

"(2) The term 'like product' means a product which is like, or in the absence of like, most similar in characteristics and uses with products being imported into the United States in violation of section 592(a) of the Tariff Act of 1930; and

"(3) The term 'competing product' means a product which competes with or is a substitute for products being imported into the United States in violation of section 592(a) of the Tariff Act of 1930.

"(d) The court shall permit the United States to inervene in any action, suit or proceeding under this section, as a matter of right. The United States shall have all the rights of a party.

"(e) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702).

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PETER D. EHRENHAFT

November 14, 1985

BY HAND

Honorable Arlen Specter
United States Senate
331 HSOB
Washington, DC 20510

Dear Senator Specter:

Thank you very much for sending me a copy of the excerpts from the Congressional Record of January 22, 1985, in which you discuss S. 237, a bill to amend the Antidumping Act of 1916. To your introductory remarks you appended copies of letters I wrote to you on August 24, 1982, and to Senator Ribicoff on March 13, 1980, expressing my opinions about the compatibility of similar legislation introduced in previous sessions of the Congress with the international obligations of the United States under the GATT and the Antidumping Code.

For the record, I would like to assure you that I still believe those opinions are valid and that no development in the intervening years has caused me to come to any different conclusion. Therefore, I am happy to provide you with this confirmation of the views I expressed in the past. I will look forward to presenting this opinion at the hearings you have scheduled with regard to your proposal.

Sincerely,

Peter D. Ehrenhaft

P.S. Your office also requested the resumes I am pleased to enclose. PDE

Enclosures

Senator SPECTER. I share your concerns about the availability of the damage action. I would not want to see the traditional defense to an equity action of an adequate remedy at law on damages. That is a concern which I have.

It is a matter of emphasis and a matter of draftsmanship as to how laws are structured. Suppose we were to leave the remedy on an equal footing as to damages or injunctive relief. What, then, would your opinions be as to the GATT issue?

Mr. CUNNINGHAM. At an equal level, I think people will still throw the argument at you. I think it can be drafted in a way——

Senator SPECTER. They will throw the argument at us, Mr. Cunningham, regardless.

Mr. CUNNINGHAM. Yes. I think I would be somewhat impressed with the argument on the other side if you do not have some subordination of injunction to damages. But I think drafting can accomplish that, both in terms of making it clear that an injunction under the particular circumstances of this law may have a different sort of damages inadequacy analysis than you have in an ordinary case. You are, after all, dealing here with a situation in which competing firms' market positions are at stake, and even a damages remedy for lost sales is probably not adequate to recompense you for your loss of your market position, which is very difficult to regain once it is lost. And I think something can be done along that line——

Senator SPECTER. The whole issue of computing damages is difficult to start with, and if you give damages to the steel corporation, what have you done for the workers who have lost their compensation or lost their jobs, or what do you do for the indirect effect for the city of Clarion, which goes bankrupt and has to fire its fire and police department?

Mr. CUNNINGHAM. I agree with that concern, and I think that can be handled in drafting, but I do not think that a statute which gives an equal priority to the restriction of imports is free of vulnerability to the GATT argument. I think you can structure ancillary injunctive remedy language in the statute, to have the court focus on precisely the issues you are concerned about there and accomplish the same thing you want to do without making yourself vulnerable.

I would like to say one thing also about the issue that you raised about not having the adequacy at law problem preventing your injunction being obtained. I do not think that is the major problem. The concern that I would have in getting an injunction quickly—and mind you, it is the quick injunction that is the desired goal here—is that I am afraid courts are going to look at this, and they are going to have more problem with substantial likelihood of prevailing on the merits than they are with the question of adequacy of remedy at law. They are going to say computation of price discrimination or below-cost selling is as complex a problem here as it is in Robinson-Pattman; it is, moreover, further complicated by the fact that the facts that are to be discovered are going to have to be discovered in foreign countries where we are going to have all that difficulty that we have had in all transnational litigation. And I am a little reluctant to find—I, speaking as a judge here—I am a

little reluctant to find that there is a substantial likelihood of prevailing on the merits.

I emphasize, however, that I would not want you to give up the right or the ability to get damages. It would be especially universe to lessen the ability to get damages in exchange for what I fear may turn out to be not as accessible an injunction relief as you may hope for.

Senator SPECTER. But you think if it is couched in the traditional approach of damages and equitable relief, that that eliminates the GATT problem.

Mr. CUNNINGHAM. I do.

Senator SPECTER. Do you concur with that, Mr. Ehrenhaft?

Mr. EHRENHAFT. I think that it is a large step in that direction. Just to underscore one little point——

Senator SPECTER. A substantial step in that direction?

Mr. EHRENHAFT. Yes——

Senator SPECTER. You have been more definite in the past in your writings, haven't you?

Mr. EHRENHAFT. We have not in the past discussed the injunction aspect. We were talking about a remedy for damages, and the remedy for damages, I believe, can be fully squared. I believe it is by far the better argument.

Senator SPECTER. Mr. Ehrenhaft, I think when you testified in the past, we had equitable relief, as well.

Mr. EHRENHAFT. Which I think, however, was subject to the traditional tests of an injunction, which would include first, what Mr. Cunningham just pointed out, the requirement that the party seeking such an injunction prove the likelihood of success on the merits, include, second, the showing of the inadequacy of the remedy at law, and, third, the other tests of injunctions, which are that granting the relief is in the public interest and that the remedy sought is not disproportionate to the harm to the other side if the injunction is granted——

Senator SPECTER. Well, if you have those traditional requirements for injunctive relief, then you think there is no GATT problem; it would not be illegal under GATT?

Mr. EHRENHAFT. I do not think so, because then, I think it is fully consistent with our usual domestic legal system for enabling parties to recover damages. In those situations, the equitable relief is in aid of the damage remedy—that is really what the purpose of the injunction is. It exists because we cannot get to the legal remedy quickly enough; the injunction is an ancillary, equitable and interim kind of remedy. If that is pursued in its traditional format, I believe that then your bill can be squared with GATT.

Senator SPECTER. Do you concur with that, Mr. Cassidy?

Mr. CASSIDY. The situation on customs fraud is slightly different, because the GATT rules that apply are different than those that apply to dumping.

Having said that, I agree with the conclusion with respect to the proposed customs fraud remedy of damages. Because we need to create a major new disincentive to the commission of customs fraud and because many of the perpetrators of fraud in this area are quick-hit artists, the fact that they might be threatened with an injunction on exporting to the United States would not be a sig-

nificant deterrent to them. On the other hand, if they thought they might be liable for a substantial monetary penalty, then they would react differently.

Mr. CUNNINGHAM. Could I just underline that point for just a second. I think there is an example that could be drawn here from the way foreign companies regard the U.S. court system and the threat of the damages remedy in the product liability area. In talking with foreign companies, nothing impresses one more than the extent to which they have the fear of God put into them on product liability issues, by the fact that they get hit with damage awards of substantial magnitude in U.S. courts. I would reiterate again that the one thing that will accomplish more than anything else in terms of an impact on the foreign exporting community is the first big damage award you get under this statute.

Senator SPECTER. Well, I am impressed by your testimony gentlemen. Let me just ask one more question for all three of you, and that is the issue of the ability of Federal courts to provide appropriate enforcement either as to damages or as to equitable relief, should that be found to be warranted, in terms of its speed and greater speed. You have already commented on this, Mr. Cunningham, but do you concur Mr. Cassidy, that the remedies under this bill would be substantially faster and more effective than the current remedies available?

Mr. CASSIDY. Well, in the fraud area there is no private remedy available, so certainly the remedies to fraud would be more readily available.

Senator SPECTER. Mr. Ehrenhaft?

Mr. EHRENHAFT. I am frankly doubtful about that, Senator. I think that the courts will be much more willing than is our Commerce Department to enable lawyers on both sides of the argument to pursue discovery to try and quantify accurately what the dumping is or what the subsidy amount is.

In the Trade Agreements Act, you have very tight time limits which the Commerce Department respects pretty rigorously. I think that the courts are used to, in important litigation, antitrust litigation, and so on, to allow wide-ranging discovery, and I think you will find that same attitude would probably prevail in this kind of litigation.

Senator SPECTER. But what kind of discovery would the defendant be seeking of the plaintiff that would slow it up?

Mr. EHRENHAFT. We are talking about the need for the plaintiff to get——

Senator SPECTER. Well, the plaintiff might well seek the discovery, or the plaintiff might be able to prove his case without the discovery or with a limited amount of discovery. That would be within the control of the plaintiff. But the defendant would not be able to slow it down by seeking discovery of the plaintiff, would he?

Mr. EHRENHAFT. I think that as a practical matter, the plaintiff, in order to prove the necessary likelihood of success on the merits, would be required to obtain substantial evidence, primarily abroad, of the kind that the Commerce Department now seeks in dumping cases. We are not talking about pursuing this damage remedy after an administrative dumping case is completed. When you do that, as you have also suggested and provided in the bill, using the adminis-

trative findings as prima facie evidence, then the private suit could proceed a lot faster. But if we are talking about obtaining injunction right out of the box at the outset of a case, it seems to me that in order to carry the burden of proving likelihood of success on the merits the plaintiff would require some pretty extensive discovery, which I believe defendants would have a pretty good opportunity to delay. Therefore I am not persuaded that you could quickly get to that point.

Senator SPECTER. Well, as Mr. Cunningham has pointed out, even under the ITC cases, plaintiff's counsel has to do a great deal by way of preparation. It may well be sufficient to get an injunction there, or to proceed with the damage case. It might not, but it might be.

Senator Heflin has asked that a statement be included in the record which, without objection, it shall be.

[Statement follows:].

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Mr. Chairman: I commend you for holding these hearings on the problem of foreign subsidized imports. The situation is urgent. American industry is crying out for our immediate assistance, it is crucial that we act now to save American jobs before it is too late.

Two years ago, in hearings before this committee, I addressed this same subject, and spoke about the closing of one of the largest steel manufacturers in my home State of Alabama, leaving hundreds without jobs. This occurred in Alabama's largest city, Birmingham, which suffered at the time an unemployment rate of 16.4 percent. Across the State of Alabama in 1983, 120 plants closed, and over 5,000 workers were left without jobs. The crisis has deepened since 1983. In 1984, over 200 plants closed and over 4,000 workers were displaced. Statistics are not yet in for the current year, but the crisis is not yet over.

Alabama companies and their employees are being devastated by unfair trade practices, and not only the steel industry has been hard hit. Manufacturers of rubber, electronics, and many other goods and materials are being devastated by subsidized imports.

"Dumping" is clearly unlawful, yet the practice continues because current law provides no mechanism for vigorous and effective enforcement. The harsh result is rising foreign imports, and American industry on the decline.

I believe in free trade—but free trade requires fair trade. To assure fair trade, we must act to prevent foreign governments from subsidizing their own industries and then dumping these foreign goods in the United States at bargain basement prices. These practices are unlawful, and if allowed to continue will undermine the structure of our entire economy.

Today we are considering legislation to allow injured American industries to seek timely, effective relief in Federal court to prohibit subsidized imports from entering U.S. markets. This is a matter of simple justice, and is necessary to protect American jobs and to stem the decline of vital industries due to unfair foreign advantage.

Thank you, Mr. Chairman.

Senator SPECTER. I would like to turn now to my distinguished colleague from Iowa, Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I do not have any questions of this panel, but I would like to note that in 1 hour, at 2 o'clock this afternoon, Senator Danforth is going to have a news conference on trade legislation that he has introduced which is somewhat controversial. His approach, is not as aggressive as what you are doing here, and I believe I have some sympathy for what you are trying to do. As I have read the statements and listened to this questioning I sense that people in my State have experienced somewhat the same problems you have had with some of your industries. I am referring particularly to the importation of Canadian pork into

Iowa. We went through this elongated procedure of obtaining a favorable ITC ruling and then the Secretary of Commerce rule favorably, and then go back to the ITC and all of a sudden, we got only about half a loaf, maybe even less than half a loaf. That took a period of something like 15 months, and we really ended up with very little.

So as I review this legislation of Senator Danforth's that, by the way, I am cosponsoring, I will be looking for some way of speeding this process along. I am sure you have experienced the same frustration, and as a result, your legislation.

Senator SPECTER. Correct. Thank you very much, Senator Grassley.

And thank you very much, gentlemen, for participating.

That concludes the hearing.

[Whereupon, at 12:55 p.m., the committee was adjourned.]

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